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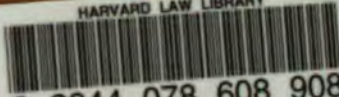
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PRACTICE REPORTS

IN THE

SUPREME COURT

AND

COURT OF APPEALS,

OF THE

STATE OF NEW YORK.

BY NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW YORK.

VOLUME XLIII.

F

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SUPREME COURT.

ALLEN PAYNE, who prosecutes in his own behalf and that of all other judgment creditors of WILLIAM P. SHELDON, who choose to join with him, agt. WILLIAM P. SHELDON, impleaded with others.

A creditor at large, with a judgment which is a general lien upon all his debtors' real estate, cannot maintain an action in equity to set aside the fraudulent conveyances of his judgment debtor, which obstructs the collection of his judgment out of such real estate, without the *issuing of an execution* and ascertaining that it cannot be collected of the personal property of his debtor. (*The authorities upon this question examined and considered*).

Where an execution has been duly issued by a judgment creditor to the sheriff of a county, and by him returned unsatisfied, a complaint by the judgment creditor, in equity, to reach the property of the judgment debtor is defective, if it does not allege that the execution was issued to the sheriff of the county *where the judgment debtor resided* at the time of its issue and of the recovery of the judgment.

Monroe Special Term, December, 1871.

DEMURRER to plaintiff's complaint.

E. W. GARDNER, *for defendant.*

E. G. LAPHAM, *for plaintiff.*

E. DARWIN SMITH, *J.*—The complaint in this action sets out two judgments recovered against the defendant, William P. Sheldon. Upon the judgment first described, no execution appears to have been issued. Upon the judgment secondly described, it appears that an execution was duly issued to

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the sheriff of Ontario county, and returned unsatisfied. If it had been alleged, that Ontario county was at the time of the recovery of such judgment and the issue of such execution, the place of residence of the judgment debtor, the complaint would have contained all the requisite allegations to entitle the complainant to maintain the action as a creditor's suit, to reach the equitable property of the judgment debtor, and to set aside any fraudulent conveyance of his property.

So far as is necessary to enable the complainant to maintain this action upon the ground, that he had exhausted his remedy at law, the demurrer is well taken.

The question remains, which is the chief point discussed upon the argument and presented for consideration upon this demurrer, is, whether a creditor at large with a judgment which is a general lien upon all his debtor's real estate, can maintain an action in equity to set aside the fraudulent conveyances of his judgment debtor which obstruct the collection of his judgment out of such real estate, without the issuing of an execution, and ascertaining that it cannot be collected of the personal property of his debtor.

A judgment recovered in this court is a general lien upon all the debtor's real estate, situate in any county in this state wherever such judgment is docketed, and it may be docketed in any county in the state. Such judgment does not become a specific lien upon any of the real estate of the judgment debtor, until a proper execution is issued thereon to the sheriff of the county where such property is situated.

The proper execution to be issued upon every judgment recovered for a simple contract debt, is a *feri facias*, as such process used to be called. Now, it is an execution against property, and every such execution (*Code, sec. 289*), must require the sheriff to satisfy the judgment out of the personal property of such debtor, and if sufficient personal property cannot be found, out of the real estate belonging to him on the day, when the judgment was docketed in such county, or at any time afterwards.

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It would seem in principle, that no proceedings in equity for the enforcement of any such judgment, or to remove incumbrances, in the way of its collection can be instituted, or should be entertained, until it appeared that the proper proceedings for that purpose at law had proved ineffectual.

This action was obviously commenced upon the theory, and the argument to sustain the complaint on the part of the plaintiff was directed to establish, that an action in equity may be commenced by a judgment creditor to set aside and remove fraudulent conveyances in the way of his collection of his debt, immediately upon the recovery of such judgment, and the docketing the same in the proper county, and without the issuing of any execution thereon.

In support of this view, reference was had to certain dicta to that effect by Chancellor KENT, in *Brinkerhoof* agt. *Brown*, (4 *Johns.*, Ch., 677) and by Chancellor WALWORTH, in *Clarkson* agt. *DePuyster*, (3 *Paige*, 322), and of Chief Justice NELSON, and Senator Tracy, in *McElwain* agt. *Willis*, (9 *Wend.*, 503 and 567), and some few other cases where the same rule is stated.

I have looked into all the cases cited to me, and others, and I do not find that this doctrine has been particularly discussed or considered in any of them, or distinctly asserted in any actual judgment rendered by the court.

The opposite view holding, that judgment creditors cannot maintain an action in such cases, without execution and in aid of an execution is held in two well considered cases, in the superior court of the city of New York, at general term. One, the case of the *North American Ins. Co.* agt. *Graham*, (5 *Sandf.*, 197,) where the cases cited are very ably and carefully considered and reviewed by Judge CAMPBELL, late a judge of this court; and also in the case of *McCulloch* agt. *Colby*, (5 *Bosc.*, 477,) by Judge HOFFMAN, who also very carefully reviewed all the cases in the courts on the subject, and that court reaffirmed the doctrine asserted in the former case of the *American Ins. Co.* agt. *Graham*.

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These two cases are referred to with approval at general term of this court, in the first district, in the case of *Howell* agt. *Cooper*, (37 *Barb.*, 586). I entirely concur in the general reasoning of these cases, and think it my duty to follow them as the latest exposition of the law on this subject in this state.

This view will sustain the demurrer in this action, so far as relates to the first mentioned judgment, upon which no execution has ever been issued, but would not sustain it in respect to the judgment recovered by *Moule and others* agt. *Sheldon*, if it appeared that the execution upon that judgment had been issued to the proper county, that is to the county where the judgment debtor resided. This, I think, is indispensable. Such, I think, is the view of the court of appeals, as held in *Shaw* agt. *Dwight*, (27 *N. Y.*, 244 and 249).

The demurrer must, therefore, be sustained, with leave to the plaintiff to amend the complaint upon the usual terms.

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N. Y. SUPERIOR COURT.

LOUISA DONAI WEHLE, plaintiff and respondent, agt. HENRY L. BUTLER, JONATHAN J. BROOME and OLIVER M. CLAPP, defendants and appellants.

Interest on the value of goods at the time of the conversion, is no more in the discretion of the Jury than the value; it is as necessary a part of complete indemnity as the value itself.

In an action of trespass for wrongfully taking and carrying away plaintiff's goods and breaking up his business, the *attachments* under which the goods were taken, having been set aside for irregularity, they afford no shield or protection whatever for such taking to the creditors who procured them to be issued. Such protection extends only to the officer while acting under them in the discharge of his public duty.

Where all the attaching creditors actively participated in the seizure and removal of plaintiff's entire stock at one and the same time, without separating their respective proceedings, and there being no evidence from which the extent of the separate liability of any one of them could be ascertained, they must be deemed, for the purposes of the case, to have been joint tortfeasors, and as such their liability is joint and several, and enforceable accordingly at plaintiff's election.

Where a portion of the attaching creditors only, were sued in this action, the bare fact of the existence and simultaneous, but fruitless levy of the attachments issued by the other creditors, cannot be made available to the defendants in this action in any aspect of the case.

All the attaching creditors having been jointly concerned in the commission of a wrong, and being jointly and severally liable therefor at plaintiff's election, they were all alike incapacitated from making a subsequent *legal* appropriation of plaintiff's property, either for their joint account, or for account of any one of their number, without plaintiff's assent.

If evidence of a subsequent legal appropriation to plaintiff's use was competent, it cannot be received on the trial in this action, not even in mitigation of damages, without being *pleaded*. (See *Wehle agt. Haviland*, 42 How., 399.)

General Term, November, 1871.

Before BARBOUR, Ch. J., MONELL and FREEDMAN, JJ.

APPEAL from judgment entered upon the verdict of a jury.

The plaintiff in her complaint, alleged the following cause of action :

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First.—That she is and was a merchant doing business in the city of New York, and by her industry and attention had built up a lucrative and profitable business.

Second.—That said defendants are copartners, doing business in the city of New York.

Third.—That on or about the 8th day of December, 1869, said defendants made application to one of the justices of the Marine Court of the City of New York for attachments against the property of this plaintiff, and by means of dividing and cutting up an alleged and entire demand against this plaintiff, and by means of a false and fraudulent affidavit, induced the said justice to grant several attachments on said claims so divided and cut up, and with said attachments said defendants proceeded to the place of business of this plaintiff, and about 12 o'clock, midnight, awoke this plaintiff and demanded entrance to her store, in said city of New York, and upon gaining admission, seized and in a wasteful and reckless manner, carried away all the goods in said store, of the value of about twelve thousand dollars.

That by means of the said attachments so fraudulently obtained, said defendants, unlawfully, wilfully and maliciously took from said plaintiff her whole stock of goods, consisting of cloth, silks, dress goods, gloves, fancy goods, and such goods as are usually kept in a fancy dry goods store, in the city of New York, the property of this plaintiff, of the value of about twelve thousand dollars, and still unlawfully detained the same to the damage of this plaintiff in the further sum of five thousand dollars, and broke up and entirely destroyed the business of the plaintiff.

Fourth.—Said plaintiff further alleges and avers, that afterwards and on or about the 10th day of December, 1869, and on the return day of said attachments this plaintiff at great expense, in the employment of counsel, to wit, five hundred dollars, appeared in the said Marine Court, and made a motion that said attachments be vacated, set aside and discharged, and the same were vacated and discharged;

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a copy of the said order vacating, setting aside and discharging said attachments is hereto annexed and made a part of this complaint.

Fifth.—That by reason of the aforesaid fraudulent and unlawful taking and detaining of said property and the breaking up and destroying the business of this plaintiff, and the expenses she has incurred in getting said unlawful and fraudulent attachments vacated, set aside and discharged, she has suffered damage to the amount of fifteen thousand dollars, for which said sum she demands judgment, with cost of this action.

The answer of the defendants contained a general denial.

Upon the trial it appeared that on the 8th day of December, 1869, six warrants of attachment were issued by one of the justices of the marine court at the instance of the defendants, Butler, Broome & Clapp, as alleged creditors of the plaintiff, and seven other warrants in favor of Spelman & Sons, and Haviland, Lindsley & Co., other alleged creditors of the plaintiff, against the property of the said plaintiff; that on the same day the thirteen warrants were received by the sheriff, that the latter accompanied by the defendant Henry L. Butler, of defendants' firm, Mr. Haviland and Mr. Lindsley, of the firm of Haviland, Lindsley & Co., Mr. Holbrook representing the firm of J. B. Spelman & Sons, and other parties, proceeded to plaintiff's store after ten o'clock in the evening of the same day, served all the attachments at the same time, seized the entire contents of plaintiff's store and caused them to be carted in the middle of the night to a stable in 31st street, whereby plaintiff's business was completely broken up. In reply to plaintiff's remonstrances against the removal of the goods the sheriff assured her that he had plenty of bonds, and that the attachment creditors were responsible parties. All the parties named assisted in the removal of the goods to the stable, Butler, Holbrook and Lindsley following the carts to see that nothing got lost. The goods were subsequently taken from the stable to de-

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defendants' store on Broadway, where they remained nominally in custody of the sheriff for about six weeks. It also appeared that the sheriff made a separate return to each of the six attachments issued at the instance of the defendants, certifying upon the back of each of them that by virtue of the within attachment, he did attach and take into his custody the goods and chattels of the said Wehle and made an inventory of the same. The inventory reads as follows: "Inventory of property attached December 8th, 1869. Dress goods, domestic goods, flannels, fixtures, &c., value at about \$1,000." A similar return was made to each of the other attachments, issued in favor of the other creditors.

On the 13th day of December, 1869, on a motion to vacate founded on the attachments, the return of the sheriff thereon, and the affidavits on which the attachments were issued, the six attachments obtained by the defendants were vacated and set aside by order of the marine court, with costs to the defendant named therein (Wehle).

At the same time, the other seven attachments in favor of the other creditors, were vacated, with costs for irregularity.

Plaintiff thereupon demanded a return of her goods, but defendant refused, and the goods were finally sold on the 28th of January, 1870, at sheriff's sale under some execution which the defendants issued. Defendant's counsel offered to prove (it being assumed and agreed that the witness and the papers were in court), "that after these actions had terminated in the marine court, and before the commencement of this action, actions were commenced in the court of common pleas, between the same parties, and against the property of said Louisa Donai Wehle, duly and regularly issued therein, on the ground that the defendant in that suit (the plaintiff in this suit), had disposed of property to defraud creditors; and that thereunder the goods in question were seized by the sheriff; that a motion was made to vacate these attachments and denied, and that the said attachments stand to-day," which was objected to, except the fact that the actions in

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the marine court had terminated, which was admitted by both sides.

The court excluded evidence, and defendants excepted.

The value of the goods taken was variously estimated from \$2,000 to \$10,000, and on that point, the testimony was highly contradictory. Defendants showed, among other things, that at the sheriff's sale, the goods brought \$2,187 94. The plaintiff in rebuttal, recalled a witness who had personal knowledge of the condition and value of the goods in question, and put the following question :

Q. "What would the goods that you have on this list sheriff's list) sell for, in your store, at retail?"

The defendants objected, but the court admitted the question, and defendants excepted.

At the close of the testimony on both sides, defendants' counsel asked the court to direct a verdict for the defendants.

The court declined, and defendants excepted.

The court charged the jury, that the only question for them to consider was, the value of goods taken from the plaintiff under defendants' attachments, and that should be the fair retail market value of the goods on the 8th day of December, 1869, with interest to present day.

Defendants excepted to that part of the charge wherein the court instructed the jury that the only question for them to consider was, as to the value of the goods.

The jury rendered a verdict for the plaintiff for \$4,950. Defendants moved for a new trial upon the minutes of the court, which motion was denied, and defendants excepted.

Judgment was entered upon the verdict in favor of the plaintiff for \$5,287 44, and from that the defendants appealed.

C. BAINBRIDGE SMITH, *for appellants.*

CHARLES WEHLE, *for respondent.*

By the court, FREEDMAN, J.—The appeal being from the judgment merely, the only questions open for review are, the

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questions of law arising upon the exceptions taken by the defendants upon the trial.

Under the issues raised by the pleadings and the testimony given on the trial on both sides, the evidence as to the retail value of the goods taken, was properly admitted. It was, under the circumstances, competent although by no means conclusive. A question of a more serious character would arise upon that part of the charge, in which the court laid down the rule, that the value of the goods taken should be the fair, retail market value of the goods on the 8th day of December, 1869, with interest thereon, if the defendants had taken a proper exception to it at the time. But as they acquiesced in it by excepting only to so much of the charge as instructed the jury, that the only question for them to consider was, as to the value of the goods, they cannot now be permitted to urge for the first time, that the court erred in that respect.

The same remarks apply to the attempt of defendants' counsel to convince us upon the argument, that the court below erred in directing the jury to allow interest on the value of the goods, for the reason that, in all cases of this nature, interest constitutes an item of damage in the discretion of the jury. But independent of that consideration, it may be well to point to the fact, that the proposition here contended for, has been expressly repudiated in this state. "Interest on the value at the time of the conversion," says JOHNSON, Ch. J., in delivering the opinion of the court of appeals in the case of *Andrews agt. Durant*, (18 N. Y., 496), "is as necessary a part of complete indemnity as the value itself." There is no sense in the idea, that interest "is any more in the discretion of the jury than the value."

Two questions, therefore, remain to be considered :

1. The effect of the simultaneous levy under the thirteen attachments, upon the separate liability of the defendants in this action, and,
2. The admissibility or non-admissibility of the evidence

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showing a subsequent seizure under process claimed to have been valid, which was offered by the defendants and rejected by the court.

As to the first.—The action was one sounding in tort. It was trespass for wrongfully taking and carrying away plaintiff's goods and breaking up her business. The attachments under cover of which the goods were taken in the first instance, having been set aside for irregularity, they afford no shield or protection whatever for such taking to the creditors who procured them to be issued. Such protection extends only to the officer while acting under them in the discharge of his public duty. The moment they were set aside the creditors stood as though no process had ever been issued, and became trespassers *ab initio*. (*Lyons agt. Yates*, 52 *Barb.*, 237; *Kerr agt. Mount*, 28 *N. Y.*, 659.)

And as the evidence plainly establishes that all the attaching creditors actively participated in the seizure and removal of plaintiff's entire stock at one and the same time, without separating their respective proceedings, and there being no evidence from which the extent of the separate liability of any one of them can be ascertained, they must in the aspect of the case in which the question is presented by the appellants, be deemed, for the purpose of this case at least, to have been joint tort-feasors, and as such their liability is joint and several and enforceable accordingly at plaintiff's election. (*Creed agt. Hartmann*, 29 *N. Y.*, 591, affirming *S. C.*, 8 *Bosw.*, 123; *Kasson agt. The People*, 44 *Barb.*, 347.)

In such case, an answer pleading a former recovery against one, to be good, must also aver actual satisfaction. (*Phil. on Ev. 5th ed.*, Vol. II., p. 114, *134; *Wies agt. Fanning*, 9 *How.* 546.)

In the case at bar no such issue was raised by the pleadings, and if there had been there was no evidence to support it. On the contrary, the evidence showed not only that the defendants were very active in enforcing the levy and removal of the goods in the unusual and oppressive man-

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ner in which they were seized and removed, but, in addition to that all of plaintiff's goods were taken to defendants' store, kept there for weeks after the attachments had been vacated and the return of the goods demanded, and finally sold for defendants' exclusive benefit under an execution subsequently procured by them in some way, which is not specified.

The bare fact of the existence and simultaneous but fruitless levy of the attachments issued by the other creditors cannot, therefore, be made available to the defendants in this action in any aspect of the case.

As to the second.—To properly determine this question, it is necessary to inquire whether a tort-feasor, who has taken property by a wrongful act, can subsequently apply the same on legal process issued in his own favor and against the owner, and, if he cannot, under what circumstances and to what extent he may be permitted to show that the same property was taken from him again by a third party.

In *Hamner agt. Wilsey* (17 Wend., 91) it was held, that a return of property illegally taken, though accepted by the owner, is no bar to an action, the return and acceptance being available only in mitigation of damages. But even for that purpose, it is not admissible to show that property illegally taken was subsequently applied without the assent of the owner, in satisfaction of a valid execution against him. In *Otis agt. Jones* (21 Wend., 394), some horses taken under an attachment issued in an action, which the plaintiff found himself compelled to discontinue were subsequently sold under an execution issued in another action for the benefit of the same party. The judge at the circuit ruled that the effect of the sale, which was legal, was to mitigate the damages, and prevented the plaintiff from recovering any more than nominal damages. But, on appeal, the court repudiated this doctrine, reaffirmed the principle enunciated in *Hamner agt. Wilsey* (17 Wend., 91), and expressly held, that a wrong doer cannot discharge himself by any act of his own *without the assent of the injured party*. By procuring a

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subsequent sale on legal process, the defendant cannot be better off than he would be if he had offered to restore the property to the plaintiff. And yet no tender will, at the common law, either bar an action for a tort or take away the right to full compensation in damages.

The decisions in *Lyon agt. Yates* (52 Barb., 237) and *Peak agt. Lemon* (1 Lansing, 295) are to precisely the same effect.

A distinction, however, was made whenever it appeared that the property was taken again from the trespassers without any agency or connivance on his part, and applied to the owner's use, although without the latter's consent, by the act of a *third* person and the operation of law. In this class of cases the jury were permitted to take the taking of the goods by such third party and their application to plaintiffs' use into the account in estimating plaintiffs' damages. But at the same time it was deemed necessary in every instance that it should appear that the subsequent taking by such third party was independent of any agency on the part of the defendant, and that there was in point of fact an application to plaintiffs' uses. (*Higgins agt. Whitney*, 24 Wend., 379; *Sherry agt. Schuyler*; 2 Hill, 204; *Ball agt. Liney*, 44 Barb., 505; *Ward agt. Benson*, 31 How., 411.)

Now, the offer made by defendant to prove (it being assumed and agreed that the witness and the papers are in court), "that after these actions had terminated in the marine court, and before the commencement of this action, actions were commenced in the court of common pleas, between the same parties, and against the property of said Louisa Donai Wehle, duly and regularly issued therein, on the ground, that the defendant in that suit (the plaintiff in this suit) had disposed of property to defraud creditors; and that thereunto the goods in question were seized by the sheriff; that a motion was made to vacate those attachments and denied; and that the said attachments stand to-day," was rather vague. It may be questionable whether the words "between the

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same parties" mean only the parties to this action or all the creditors named in the first thirteen attachments and the plaintiff herein. Supposing the first to be the case, it is quite clear, upon the authorities already examined, that the defendants cannot be permitted to defend, either in whole or in part, the trespass committed by them by proof of a subsequent appropriation of the property to plaintiff's use, but without her consent, under an execution procured in their own favor. And if the second is assumed to be the case, the same objection seems to apply with equal force to all the attaching creditors. Having been jointly concerned for the purpose of this action, at least, in the commission of a wrong, and being jointly and severally liable therefor at plaintiff's election, they were all alike incapacitated from making a subsequent legal appropriation of plaintiff's property either for their joint account or for account of any one of their number without plaintiff's assent. To hold otherwise would be to hold, in effect, that one of a number of joint tort-feasors may escape liability by inducing any one of his confederates to do what he is not permitted to do. But inasmuch as the testimony given on behalf of the defendants shows, that the defendants were, as already stated, the only ones that derived any benefit from the taking of plaintiff's property, and that there has been no appropriation of the same in point of fact to plaintiff's use under legal process subsequently procured by the other creditors, and inasmuch as the court below charged the jury to consider the value of the goods taken from plaintiff under defendants' attachments, and the jury must be presumed to have found in accordance with such instruction, it is unnecessary to pursue this line of inquiry any further.

Another grave objection to the receipt of the proposed evidence in this action is, that even if its sufficiency as a subsequent legal appropriation to plaintiff's use as well as its competency be assumed, it is not pertinent to any of the issues raised by the pleadings, because not pleaded. Defend-

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ant's counsel, it is true, strenuously argued, that it should have been received, at least in mitigation of damages, and that, for that purpose, it did not require being pleaded. But on a critical examination, this claim also will be found to be untenable. Mitigating circumstances do not, and never did amount to a defense to any part of plaintiff's claim. They may diminish the nominal claim made by him, but do not diminish the real claim, or reduce it below what it was originally.

A defense, as understood in law language, on the other hand, is a full answer to whole or to some part of plaintiff's demand.

Under the old practice both were admissible under the general issue, without being pleaded, and this fact led to a frequent confusion of the distinction to some extent, at least, between partial defense and circumstances of mitigation (*Harter agt. Crill*, 33 Barb., 283).

Now, the evidence, which was proposed and excluded in this case, did not in any wise tend to mitigate the trespass, or to diminish plaintiff's claim, whether nominally made too large or not, for in such case, the law itself prescribes the true measure, and a certain and definite measure, of damages; it did not consist of circumstances which existed at the time of commission of the trespass, and possessed a mitigating or extenuating character that as such could be considered in estimation of plaintiff's loss, which had then fully accrued; but it was offered for the purpose of bringing about, when received, a reduction not of plaintiff's claim, but of plaintiff's recovery. Whether it be considered, therefore, as a set-off or as matter of avoidance, or in bar, in full or *pro tanto*, it was equally new matter purporting to constitute, at least a partial defense, and as such should have been set up in the answer (*Code sections 149, 150.*)

It is, indeed, somewhat remarkable that no case can be found in the books in which this precise question has been determined. The case of *Higgins agt. Whitney and Sherry*

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agt. *Schuyler*, above cited, occurred before the Code. In *Ball agt. Lincy*, (44 *Barb.*, 505), the answer did contain all necessary averments showing a full and complete appropriation to plaintiff's use ; and that the pleader must have been equally careful and precise, in *Ward agt. Benson*, (31 *How.*, 411), is apparent from the report of the whole case. But if any authority be needed, it will be found that the principle of the decision of the court of appeals, in *McKyring agt. Bull*, (16 *N. Y.*, 279), is fully applicable to the present case. SELDEN, J., in delivering the opinion of the court in that case, in the course of which he exclusively reviewed the decisions of the English courts upon this subject as well as the changes affected by the Code, concludes as follows :

" My conclusions, therefore, is that section 149 of the Code, should be so construed as to require the defendants in all cases, to plead any new matter constituting either an entire or partial defense, and to prohibit them from giving such matter in evidence upon the assessment of damages, when not set up in the answer. Not only payment, therefore, in whole or in part, but release, accord and satisfaction, arbitrament, &c., which may still, for aught I see, be made available in England in mitigation of damages, without plea, must here be pleaded" (See also *Folland agt. Johnson*, 16 *Abb.*, 235 ; *Beckett agt. Lawrence*, 7 *Abb. N. S.*, 403 ; *Bush agt. Prosser*, 11 *N. Y.*, 347, 352, and *Smith agt. Reeves*, 33 *How.*, 183). The evidence embraced in defendants' offer was, properly excluded, therefore, as not pertinent to the issues raised by the pleadings.

It appearing as the final result of this examination, that none of the exceptions taken by the defendants can be sustained in law, the judgment appealed from must be affirmed, with costs.

BARBOUR, Ch. J., concurred in the foregoing opinion.

MONELL, J., concurred in the conclusion upon other grounds.

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SUPREME COURT.

JAMES J. W. DAWLEY, appellant, agt. JOHN P. BROWN, respondent.

SAME agt. GEORGE D. FOX.

Where a regular judgment is entered giving the plaintiff possession of real property, and execution is issued putting him in actual possession, on setting aside the judgment and execution, the proper remedy of the defendant to compel restoration of the property, is to apply, under the code, to the special term of the court for an order to show cause why possession should not be restored to him, and an order granted on the hearing of the order to show cause, is sufficient authority to restore possession to the defendant. If disobedience to such an order is made it may be punished as for a contempt.

Fourth Judicial Department, Buffalo, January, 1872.

Before MULLIN, P. J., JOHNSON & TALCOTT, J. J.

THESE actions were brought to recover the possession of certain lands in the town of Mendon, in the county of Monroe. The issues thereon were noticed for trial at and were on the calender for the last April circuit in said county.

The defendant's attorney not having filed an affidavit of merits, inquests were taken by the plaintiffs' attorney on the 6th day of April last, and on the same day he entered judgments in said actions, and issued executions thereon on the same day to the sheriff of said county.

On the following day (the 7th April), the sheriff caused possession of the premises to be delivered to the plaintiff.

On the 8th April the defendant's attorney applied to the said circuit court to open the defaults and to be let in to defend, orally excusing the defaults, and the court did thereupon set aside the defaults, and did vacate said judgments upon the condition that the defendant's attorney should pay

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the costs of entering the judgments and file affidavits of merits.

The plaintiffs attorney waived the payment of the costs, and the defendants attorney filed affidavits of merits.

At a special term held at the court house in Rochester an order was made upon the motion of defendant's attorney requiring plaintiff's attorney to show cause on the last Monday of April at a special term, to be held at the court house in Canandaigua, why possession of said premises should not be restored to the defendants, and restraining the plaintiff from entering into possession of the premises and from interfering with defendant's possession, and that plaintiff wholly desist and refrain from cultivating or in any manner working said premises.

On the 25th April, pursuant to the aforesaid order to show cause, the parties were heard by the said court, and thereupon an order was made requiring the plaintiff to restore the possession of said premises to the defendant, and that he remove forthwith his family and goods from said premises, and that he desist and refrain from interfering with defendants' possession until the final determination of said actions.

From these orders the plaintiff appeals.

By the Court.—MULLIN, P. J. The judgments were regularly entered. The defendant having omitted to file affidavits of merits, the plaintiff had the right to take inquests on any morning of the term after the first, and having entered judgments, he was entitled to issue execution, and by means thereof to obtain possession of the premises.

When the defendants default was excused and the court set aside the judgments, the defendant was entitled to be restored to the possession of the premises from which he had been removed.

The sheriff swears he put the plaintiff into possession on the 7th April, and the judgments were not vacated until the 8th of that month.

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When the judgments were set aside, the plaintiff had no defense to actions by the defendants to acquire possession, or to recover damages for the illegal detention of the possession.

By the former practice, the party entitled to possession was put in possession by a writ of *habeas facias possessionem*. This was a writ of restitution when issued to restore a party to possession, who had been put out of possession by such a writ (2 R. S., & 2, ed., 235 § 41).

The provision last cited relates to cases where new trials have been granted, or recovery had by defendant in accordance with the Revised Statutes, regulating proceedings in ejectment.

These cases are not strictly within those provisions, but there being no other provisions of law applicable to the cases before us, the courts are compelled to apply the provisions referred to, as far as they are applicable.

There has been a judgment awarding to the plaintiff the possession of the premises in controversy, that judgment has been set aside, and defendant was entitled to have the possession restored to him. As that is to be done by the statute cited by writ of *habeas facias*, it must be done by the same process in these cases, unless the Code has changed the practice.

In all cases, where restitution was required to be made before the Code, by courts of record, it was done by writ (*Graham's Pr.*, 2 ed., 836-7; *Same*, 367; 7 *Cow.*, 417; *Comyn's Dig.*, *Title Pleader*. 3 B., 20)

Has the Code provided any other mode for enforcing restitution than by writ?

Section 266 of the Code provides, that when the service of the summons is made by publication, the court may require of the plaintiff security that he will abide the order of the court touching the restitution of any estate or effects directed by the judgment to be transferred, or the restitution of any money collected by virtue of such judgment.

By section 330, an appellate court may on reversing or

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modifying a judgment, make restitution of all property and rights lost by the erroneous judgment.

By section 369, the county court is required to order the amount paid or collected on a judgment that has been recovered, to be restored with interest. And the order may be obtained on notice of six days. And if such order is made before judgment, the amount may be included in the judgment.

The common pleas of New York, hold the practice under this section to be for the appealing party entitled to restoration, to apply for it to the appellate court, and if granted, it becomes a part of the judgment, and the amount can be collected by execution (*Kennedy agt. O'Brien*, 2 E. D. *Smith*, 41.)

These provisions of the Code contemplate restitution before and after judgment, and as part of the relief given by the judgment. Where the order for restitution is made after judgment, it is entered by way of suggestion at the foot of the record. Where granted as part of the relief, it forms part of the judgment. And if granted before it may be made a part of the judgment. But if not made part of the judgment, restitution is obtained through the order.

Where restitution is granted by judgment it can only be enforced by writ, whether it be to restore possession of real or personal property, or the re-payment of money, except where the judgment directs the doing of something other than the delivery of real or personal property, and the payment of money, the failure to perform may be punished as a contempt (*Code*, § 285).

Where restitution is directed by order, it must be enforced by execution, if that process can effect it, if not, then there is no way to protect the party except by punishing disobedience of the order as a contempt.

In 2d *Salkeld*, section 88, it is said, that where a judgment is set aside after execution for irregularity there needs no *scire facias* for restitution, but an attachment should

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be granted upon the rule for contempt, if there be not restitution.

By this, is meant, I suppose, that when the judgment is set aside, there is no roll on which to enter either judgment for restitution, or a suggestion. And, as the rule or order directing restitution, is the only authority for it, disobedience to it, is treated as a contempt.

I am unable to perceive any reason why the practice pursued, in the case cited should not apply to the cases before us (*The People* agt. *Johnson*, 38 N. Y., 763; *Chamberlain* agt. *Choles*, 35 N. Y., 477).

For these reasons, the orders appealed from should be affirmed, with \$10 costs.

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SUPREME COURT

JAMES J. W. DAWLEY, agt. JOHN P. BROWN.

SAME agt. GEORGE D. FOX.

Where an order of *restoration* at special term, is made, after setting aside judgment of dispossession obtained by the plaintiff—the plaintiff being in lawful possession of the premises, it is irregular to include in such order of restoration granted to the defendant, an *injunction clause* restraining the plaintiff from entering into or interfering with the possession of the premises and restraining him from cultivating or otherwise using the premises. When restored to possession, the remedy of the defendant would probably be by action for any illegal entry or injury done the premises by the plaintiff (*See S. C., ante, page 17*).

Fourth Judicial Department, Buffalo, January, 1872.
Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.

By the court, MULLIN, P. J.—In addition to the facts stated in the statement of facts preceding the opinion in the other appeals between the same parties, argued at the June term, it is proper to refer to a few others, in order the better to appreciate the grounds for reversing the orders appealed from.

On the 15th April, 1871, the special term made an order, that plaintiff desist and refrain from entering into or interfering with the possession of the premises in controversy, and from cultivating or working said premises, and that he show cause on the last Monday of April, before the Ontario special term, why possession should not be restored to the defendant, and why the order above mentioned should not be continued until the final decision of the action.

This order was personally served.

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Subsequently, and on the 18th of April, the plaintiff was seen plowing on the premises in dispute. Thereupon Justice J. C. SMITH, made an order, that plaintiff show cause on the 25th April, at the Ontario special term, why he should not be punished for a contempt for violating the order by plowing said premises.

On the 25th day of April, the plaintiff appeared and showed cause in pursuance of said order, and the special term decided that the plaintiff had been guilty of contempt in plowing said premises in violation of said order, and ordered that an attachment issue against said plaintiff, to the end that he might be punished for such contempt.

An attachment was accordingly issued, plaintiff was arrested thereon, and the 4th May, 1871, the said plaintiff appeared before the special term in Ontario county, and the said court referred it to a referee to ascertain and report the amount of costs and expenses incurred by defendant in the proceedings for contempt. The referee reported the amount, and on the 10th day of May, the said court made an order, that the plaintiff pay to the defendant the sum so ascertained, which sum was fixed as the fine imposed on the plaintiff, as punishment for the contempt aforesaid, and that he stand committed until said sum is paid.

From these orders the plaintiff appeals.

The plaintiff having been put into possession by virtue of an execution issued on the judgment adjudging him entitled to the possession of the premises in question, was lawfully in possession.

That possession commenced on the 7th April. On the 15th of that month, when the first order to show cause was made and enjoining plaintiff from entering into possession, he was in the peaceable and lawful possession of the said premises.

The order so far as it attempted to restrain him from entering, was a nullity.

The only relief to which the defendant was entitled, was

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to have the default opened, the judgment set aside, and restoration to the possession.

The judgments were set aside, on the 8th April, upon compliance with a condition. When the condition was actually complied with, we do not know, but it must have been before the order of the 15th was made.

The judgments being set aside, there was nothing to justify the issuing of a writ of restitution. If the defendant was to be restored, it must be by order. I find no authority for embracing in such order a provision restraining the plaintiff from cultivating, nor otherwise using the premises. When restored to possession, I suppose the defendant might maintain an action against the plaintiff, not only for the illegal entry, but for any injury done to the premises while in possession.

If the order was intended to operate as an injunction, the provisions of the Code, as to security, &c., must be complied with, and if not complied with, it would be irregular.

But mere irregularity would not excuse a violation of it by the party enjoined.

The parties enjoined in these cases was the plaintiff. The Code does not authorize an injunction in favor of the defendant against the plaintiff. It can only issue in favor of a plaintiff (*Code*, § 219, *Springsteen* agt. *Powers*, 4 *Robt.*, 624).

If a defendant desires to restrain the plaintiff, he must commence a cross-action.

The court having no power to issue an injunction, it is utterly void, and the party enjoined cannot be held liable for contempt in disobeying it (*People* agt. *Sturtevant*, 8 *Seld.*, 266).

This objection is fatal to the order appealed from, and it is, therefore, unnecessary to consider the other questions discussed by counsel.

The orders of the special term must be reversed, with \$10 costs.

Matter of Robinson.

U. S. DISTRICT COURT.

In the matter of JULIUS A. ROBINSON, a bankrupt.

In an involuntary case, the attorney for the petitioning creditor was allowed to be paid out of the fund in the hands of the assignee, not only his disbursements, but a reasonable compensation for his services in prosecuting the debtor into bankruptcy.

The practice in such case, is for the attorney to present to the register in charge a petition directed to the court in bankruptcy, praying to be allowed for such services and disbursements. The register then takes testimony touching the necessity and value of such services and disbursements, and certifies the same with his opinion thereon to the district judge who makes such order thereon as the testimony seems to warrant.

Southern District of New York, in Bankruptcy.

AT chambers, No. 4 Warren street, in the city of New York, in said district, on this 9th day of January, A. D. 1872.

I, the undersigned register in charge of the above entitled matter, do hereby certify, that the petition of Charles H. Woodbury, hereto annexed, was duly filed on the 20th day of December, 1871. That thereupon notice was given to the assignee, that testimony would be taken before me on the 22nd day of December, at my chambers in support of the prayer of the petition. That on the said 22d day of December, the said petitioner and the said assignee, by Mr. C. W. Bangs, his attorney, appeared before me pursuant to said notice, and thereupon the said Bangs objected to the proceedings before the register, on the ground, that no special order of reference to the register had been made upon said petition.

That I overruled said objection, holding that as the case had been referred to the register generally, it was not neces-

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sary to obtain a further order referring to it him to take testimony, &c. But that I would proceed to take such testimony as should be offered on both sides, and then, if desired by either party, would certify the whole matter to the judge for decision. To which ruling the said Bangs excepted, and desired the point to be certified to the court for decision. That thereupon the matter was, by agreement of the parties adjourned to the 26th day of December, when the said petitioner and the assignee in person appeared before me, and proceeded to take the testimony which is hereto annexed.

That at the close of the testimony, the assignee stated, that as he thought, the charge of \$300 reasonable, he did not wish to call witnesses or oppose the application—but still desired the question of practice to be certified to the court.

And, I further certify, that I think, as well from the said testimony as from my knowledge and recollection of the services rendered, that the sum of \$300 would not be above the ordinary rate of charges in this city for similar services, and I, therefore, recommended the entry of an order that the assignee be directed to pay over to said petitioner, in satisfaction for said services the sum of \$300 from the funds of said estate in or to come into his hands, besides the sum of \$196 45-100, which appears to have been disbursed by the said petitioner in said proceedings amounting in all to the sum of \$496 45-100.

And touching the question of practice raised by the said attorney for the assignee, I further certify, that I have adopted this practice in several cases before me with the approbation of this court, and that a similar practice prevails as I am informed with registers generally.

It would seem unnecessary to put a party to the expense of going into court to get an order that a register take testimony to sustain his petition, when the duty of taking such testimony is one within the general scope of the duties imposed upon the register in charge by the act—and general

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orders. The order referring the case to the register, requires him "to take such proceedings therein as are required by the act." The act requires him "to sit at chambers"—implying that he is charged, in the case assigned to him, with the ordinary chamber duties of the court. This is the construction given to the act by the report of the committee on "revision of the laws" adopted by congress, February 23, 1871. In that report, congress clearly construe the act as conferring upon the register the power to do every act in a case assigned to him which the court could do, except passing upon an "issue framed" for the opinion of the court, committing for contempt and allowing or suspending an order of discharge. That such judicial power should be withheld from the register, is obviously necessary in the interest of uniformity of decision which is, no doubt, sufficiently endangered by the inevitable division of the country into forty-eight judicial districts, in each of which there is a judge of a co-ordinate power and jurisdiction. If the register may not take such testimony without the special order of the judge, it would be difficult to say what acts he might do without such order.

The convenience of this practice has suggested and commended it to me. Under it, the attention of the judge is but once called to the matter, when he has before him the petition, the testimony which both parties desire to submit, with the opinion of the register upon the same, and if counsel desire to be heard, the case can be set down for hearing upon the papers before the court.

The convenience and economy of this practice is, therefore, so obvious, that I hope the court will permit it to be continued, notwithstanding the objection made to it by the attorney for the assignee.

Respectfully submitted,

I. T. WILLIAMS,
Register in Bankruptcy.

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Upon the foregoing certificate the judge made the following order :

Upon reading and filing the petition of Charles H. Woodbury, the testimony taken thereunder, and the certificate of the register herein, and upon hearing Mr. Woodbury in his own behalf, and Mr. C. W. Bangs for the assignee: Ordered, that John Sedgwick, the assignee of the bankrupt above named, pay to Charles H. Woodbury above named forthwith from the funds of the estate of the bankrupt above named, now in his hands, the sum of three hundred dollars for his services rendered the said estate; and the sum of one hundred and ninety-six 45-100 dollars paid out by him therefor, and the sum of thirty 20-100 dollars paid out by him for register's and clerk's fees on their petition; in all the sum of five hundred and twenty-six 75-100 dollars.

Dart agt. Walker.

NEW YORK COMMON PLEAS.

JAMES DART and another agt. MARCUS WALKER and ANDREW MCKINNEY.

Where one of several defendants, at the time of the commencement of the action, resides in this state, his subsequent removal to another state, will not authorize the court, on his petition, to remove the cause into the United States court.

Under the act of Congress of July, 1866, one of several defendants, who was a citizen of another state at the time of the commencement of the action, may, on his petition, have the cause removed into the United States court, as to himself, where he can make it appear that the suit is one which "there can be a final determination of the controversy, so far as the petitioning defendant is concerned, without the presence of the other defendants as parties in the cause."

General Term, December, 1871.

Before CHARLES P. DALY, *Ch. J.*, HAMILTON W. ROBINSON and JOSEPH F. DALY, *JJ.*

THIS is an appeal from an order made on the application of both defendants for the removal of this action, now at issue and pending in this court, to the circuit court of the United States of the Southern District of this State.

STARR & RUGGLES, *attorneys for plaintiffs.*

ELDRIDGE & JOHNSON, *attorneys for defendants.*

By the Court, ROBINSON, J. The application was made on the affidavits of both defendants, that both plaintiffs are not residents of this state; that they (the defendants) are both residents of the state of Massachusetts; that the matter in controversy is a claim for damages in the sum of \$30,000 (far exceeding \$500, exclusive of costs), that they both believe that from prejudice or local influence they and each of them will not be able to obtain justice in this court.

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The application is also founded upon their joint petition for such removal of the cause, stating substantially the same facts as are contained in their affidavits, in which they jointly and severally offer the security required by the acts of congress of March 2, 1867, or that of 1866, to which it is amendatory.

The action was commenced in December, 1865, and issue was joined in March, 1866. The defendant Walker was, at the time of the commencement of the suit, a resident of this state, but for the past year and upwards, has been a resident of Massachusetts, while the defendant McKinney, at the commencement of the action and ever since, has resided in Massachusetts. The cause has been once tried, but on appeal a new trial has been ordered, and the case now stands for trial on the calendar of this court.

As to the defendant Walker, he cannot avail himself of the benefits of either of the acts of congress of July 27, 1866, or March 2, 1867, above referred to.

At the time of the passage of both these acts, this suit had been already commenced and was then pending. It was not (as to him) one pending between a citizen of the state in which the suit was brought, against the citizen of another state, "nor was it one that was" "thereafter commenced," so that he did not come within either category of the statute.

His subsequent change of residence to the state of Massachusetts did not affect the exclusive jurisdiction of this court, nor authorize the removal of the cause to the circuit court of the United States. The order denying the application in his behalf was correct and should be affirmed.

The motion was, however, granted as to the defendant McKinney, on condition that he file a bond in the penalty of \$20,000, with sureties, conditioned for the performance of the requirements of these acts.

An objection is taken by the plaintiffs on the ground that the application was made with express reference to the act

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of 1867, and that the defendant McKinney is not within the intent of that statute, because it has only reference to a suit between "a citizen of the state in which the suit is brought and a citizen of another state." That, where all the plaintiffs are residents of one state, and all the defendants reside in another, and that no such relief as is sought can be afforded, because the application is made with reference to the act of 1867, and should not be granted under the act of 1866, because not asked for under that statute.

Undoubtedly the act of 1867 is to be construed in harmony with that received by the similar terms in the judiciary act of 1789, and has reference only to actions between one or more plaintiffs (of one class), and one or more defendants of the other class, in which the application for the removal of the cause should be made, either by all the plaintiffs, citizens of one state, or by all the defendants who are citizens of another. (*Fisk agt. Chicago Rock Island & P. R. R. Co.*, 53 *Barb.*, 472.) The act of 1866, however, is one for the benefit of such of several defendants citizens of a state other than that in which the suit is instituted, who make it appear to the satisfaction of the court, by petition, that the suit is one which "there can be a final determination of the controversy so far as the petitioning defendant is concerned without the presence of the other defendants as parties in the cause."

The petition alleges, and, by a statement of the nature of the action, discloses it to be one of this character, and although the rights of the petitioners as stated may be sought under and by erroneous reference to a particular statute, yet the appropriate relief may be granted, although afforded under a different act. It is further objected on the part of the plaintiff, that the petition is joint, and being denied as to one defendant, should be as to both.

The petition states the case of each defendant and shows as to McKinney, that he is within the provisions of the act of 1866, and that a removal may be made as to him, although refused as to Walker. They each offer to comply with the

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conditions of the statute, and the order allowing the application as to the defendant McKinney, on terms conforming to the act of 1866, could not have been properly denied.

By these statutes, application for the removal can be made "before trial or a final hearing," and it is also urged that a trial having previously been had, the application is too late. This objection should not prevail. That trial was adjudged a *mistrial*, and the case now stands for trial as if none such had occurred. A trial being the final determination of the merits of the controversy, such judicial consideration of the case must necessarily yet be had. (*Ackerly agt. Vilas*, 7 *Am. Law, Reg. N.*, 3, 229.)

The order appealed from was in all respects proper, and should be affirmed, but without costs.

Turner agt. Van Riper.

SUPREME COURT.

JOSHIA H. TURNER, appellant, agt. SETH A. VAN RIPER,
and others, respondents.

It has repeatedly been decided that a plea of *license* does not raise a question of *title to land*. And where there is no *certificate* of the judge who tried the cause—that title came in question on the trial, the court must assume, for the purpose of the question as to who is entitled to *costs*, that the question of title was not raised either in the pleadings or on the trial.

Where an action is brought to recover treble damages for trespass on land, &c., pursuant to title 6, ch., 5, 3d part of the Revised Statutes (2 *R. S.*, 2d ed., 261, §, 1, &c.), and the plaintiff claims \$1080, but recovers only \$5, the defendant is entitled to *costs*.

This provision for costs in the Revised Statutes, in these actions, is *repealed* by the Code.

Although the Code does not, in terms, provide for costs in actions of trespass on land, yet, as it provides for costs in actions of ejectment and in actions in which title to real estate shall come in question, and is silent as to actions of trespass, it must be assumed that that class of actions was intended to be embraced by some other provision, if any is applicable to it.

The only other provision of § 304 which can be said to embrace this class of actions, is the subdivision of said section which gives costs to the prevailing party in actions for the recovery of money, when the plaintiff recovers \$50. And this subdivision would seem to apply to actions of trespass.

The plaintiff is not entitled to costs under the Revised Statutes because in his complaint he claimed \$1080 damages, an amount exceeding the jurisdiction of a justice of the peace.

A justice of the peace has jurisdiction of an action on a note or other contract, and in an action of trespass, although the damages claimed may exceed \$200, but because of the amount of the claim, he cannot try it. This description of actions is not that to which sub. 3 of § 304, is intended to apply. The court has jurisdiction of such actions, but not of the particular cases.

It would seem that the courts have heretofore sanctioned this injustice, as to the claim for the amount of damages destroying the jurisdiction of a justice in the action, and the inquiry is whether that rule of law is still in force.

Fourth Judicial Department, Buffalo, January, 1872.

Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.

By the court, MULLIN, P. J.—This action was brought to recover treble damages for trespassing on the lands of the

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plaintiff, and cutting down and carrying away timber pursuant to title 6, chap. 5, 3d part of the Revised Statutes (*Sec. 2, R. S., 2d ed., 261, § 1, &c.*).

The plaintiff recovered \$5. The special term held the defendant was entitled to costs, for the reason that the plaintiff recovered less than \$50 damages.

The defendant's answer admitted that the land on which the timber was cut belonged to the plaintiff, but alleged that it was cut by the leave and license of the plaintiff.

It has been repeatedly held that a plea of license does not raise a question of title to land.

And there is no evidence before us by the certificate of the judge who tried the cause, that title came in question on the trial. A certificate of the judge is the only competent evidence of that fact.

We must assume for the purposes of the question as to who is entitled to costs, that the question of title was not raised either in the pleading or on the trial.

The plaintiff insists that he was entitled to costs, and not the defendant, because the provisions of the Revised Statutes giving costs to the plaintiff, on a recovery by him of any amount of damages in an action for trespass on lands, are still in force, not having been repealed by the Code, either in terms or by implication.

By § 3 of title 1 of chap. 10, of the 3d part of the Revised Statutes (2 *R. S., 2d ed., 508, and 9*), it is provided that in the following cases, if the plaintiff recover judgment by default upon confession verdict, demurrer or otherwise in any action or proceeding at law, he shall recover the costs allowed for services in the court in which the action shall be brought.

1. In all the actions relating to real estate enumerated in the fifth chapter of the act and in all proceedings to recover the possession of land forcibly entered or forcibly detained.

2d. In all actions in which title to land shall be put in issue by the pleadings or come in question on the trial.

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3*d*. In suits and proceedings upon writs of *scire facias*, &c., &c.

An action for cutting down and carrying off trees or timber from the land of another is one of the actions in which by the third section, above cited, costs of the court in which the action is brought are given to the plaintiff upon a recovery therein, without regard to the amount of such recovery.

It only remains to inquire whether this provision of the Revised Statutes, giving costs in this class of actions, has been repealed.

Section 303 of the Code declares that all statutes, establishing or regulating the costs or fees of attorneys, &c., in civil actions, and all existing rules and provisions of law, restricting or controlling the right of a party to agree with an attorney, &c., for his compensation, are repealed, and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties. But there may be allowed to the prevailing party upon the judgment certain sums, by way of indemnity for his expenses in the action, which allowances are in this act termed costs.

This section was obviously intended to effect three objects: 1*st*. To abolish the fee bill prescribed by the Revised Statutes.

2*d*. To set aside the rule established in and enforced by both the Courts of Law and Equity in this State, that an agreement between an attorney or solicitor and client, that the former should receive a part of the subject matter or proceeds of the litigation as compensation for his services, was illegal and void, and,

3*d*. To establish a new measure of indemnity to the successful party for his expenses in the action.

The Revised Statutes (2 *R. S.* 2*d* *Ed.*, 508, &c.) gives the costs in an action to the party and next to the attorney or solicitor. In this respect the Revised Statutes do not differ from the Code.

But the fee bill established by the Revised Statutes pro-

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vided compensation for specific services rendered by officers of the courts and by attorneys, solicitors and counsellors.

By the fee bill established by the Code, an allowance is made to the party for certain specified services, without regard to the person or officer by whom the service is rendered. But as attorneys and counsellors and clerks and judges must render such services, the result is not materially changed. The two fee bills are in these respects substantially the same.

It is a very narrow construction of section 303 of the Code to limit its operation to a repeal of that part of the former fee bill which prescribes the costs or fees of attorneys, &c., and leaves the provisions of the Revised Statutes as to the actions in which costs may be recovered in force. It necessarily follows that all the provisions of the Revised Statutes are left by such a construction in force, if section 303 only repeals the fee bill.

Again, section 304 of the Code gives costs to the plaintiff as of course upon a recovery in the following cases:

1st. In an action for the recovery of real property, or where a claim of title to real property arises on the pleadings or is certified to have come in question on the trial.

2d. In an action for the recovery of the possession of personal property.

3d. In actions in which a court of justice of the peace has no jurisdiction.

4th. In an action for the recovery of money only when the plaintiff shall recover \$50.

The first two cases included in this list are embraced in section 3 of title 1 of chapter 10 of the 3d part of the Revised Statutes above cited. And by the first subdivision of that section, costs in actions of ejectment, trespass on land, and other actions and proceedings relating to real property, are provided for. Thus it will be seen that the Code expressly provides for costs in some of the cases embraced in the Revised Statutes, and as the last expression of the legis-

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lative will must prevail, the former statutes on the same subject inconsistent therewith must be deemed to be repealed.

The Code does not in terms provide for costs in actions of trespass on land, but as it provides for costs in actions of ejectment, and in actions in which title to real estate shall come in question, and is silent as to actions of trespass, it must be assumed that that class of actions was intended to be embraced by some other of its provisions, if there are any which can apply to it. The only other provision of section 304, which can be said to embrace this class of actions, is subdivision of said section which gives costs to the prevailing party in actions for the recovery of money when the plaintiff recovers \$50. No reason is perceived why this section does not apply to actions of trespass. It is an action for the recovery of money, and it may be brought in a justice's court. If the party will not bring it in that court, and recovers less than \$50, he ought not to recover costs if he sues in the Supreme Court.

If this is a correct exposition of the statutes, we are compelled to overrule the case of *Utter agt. Gifford* in the 25 *How.* 289.

We cannot agree with the learned judge who wrote the opinion in that case, that the provision of the Revised Statutes, giving costs to the prevailing party on a recovery in this court of any amount, is not repealed by the Code. To hold those provisions unrepealed would involve the question of costs in the most inextricable uncertainty and confusion, without being productive of the slightest benefit to either parties or attorneys.

In *The Earl of Craven agt. Price*, 37 *How.*, 15, the General Term of the Eighth District take the same view of the question that I have attempted to establish, and hold that a plaintiff who recovers in an action of trespass on real estate less than \$50 cannot recover costs, but must pay them.

The plaintiff insists that if he should be held not entitled to costs under the Revised Statutes, he is entitled to them be-

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cause the plaintiff claimed in his complaint \$1,080 damages, a sum beyond the jurisdiction of a justice—a justice's jurisdiction being restricted to cases in which the damages do not exceed \$200.

It is said in *Cowan's Treatise*, 2d ed., that where a plaintiff claims damages to an amount exceeding the jurisdiction of the justice, he has no jurisdiction of the cause. It was so held in *Yager agt. Hannah*, (6 Hill., 631), and that a declaration claiming as damages a sum exceeding the jurisdiction of a justice, was defective.

In *Humphrey agt. Persons*, (23 Barb., 313), it was said if not decided, that the Code had changed the law as laid down in *Yager agt. Hannah*, and that it is now necessary for a defendant to appear when the summons claims damages exceeding the jurisdiction as there are cases in which the jurisdiction is without limitation in certain cases, such as in actions on justices' judgments and on security bonds.

All that was intended by the remark I apprehend, was, that a defendant cannot safely keep away on the return day notwithstanding the summons may claim damages beyond a justice's jurisdiction, least the plaintiff declare for a cause of action over which the justices' jurisdiction is unlimited as to the amount.

It is singular legislation to say the least of it, that makes the jurisdiction of a court depend on the amount a plaintiff may claim, and reward him for making an unfounded claim in certain cases, by giving him costs of the court into which the defendant was forced by reason of the unfounded claim, when the inferior court would have had jurisdiction if the plaintiff had claimed no more than he was entitled to recover.

A. owes B. \$50, on a note of hand, B. sues in the supreme court, and claims \$1,000 damages. A justice of the peace has jurisdiction of such an action, when the amount claimed does not exceed \$200. The plaintiff sues in the supreme court, and recovers \$50, and demands costs, because he made

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a claim of damages beyond the jurisdiction of the justice. It would seem that the courts have heretofore sanctioned this injustice, and we are to inquire whether that rule of law is still in force.

Subdivision 3 of § 304, cited (*supra*), gives costs, of course, to a plaintiff upon a recovery in actions of which a court of justice of the peace has no jurisdiction.

He has jurisdiction of an action on a note or other contract, although the damages claimed may exceed \$200, but because of the amount of the claim, he cannot try it. This description of actions are not those to which subdivision 3, of § 304, is intended to apply.

The court has jurisdiction of such actions, but not of the particular cases. It is sometimes provided in village charters that police justices shall have the same civil jurisdiction as a justice of the peace, but persons living beyond the corporate limits, are excluded from his jurisdiction. The jurisdiction as to the forms of actions is complete, but when it appears, that the defendant resides beyond the boundaries of the corporation, his authority to proceed at once terminates. It could not be said in such a case, that the action was one of which the justice had no jurisdiction, but rather that the defendant was one over whom he neither had nor could acquire jurisdiction, without his consent.

When actions of which a justice of the peace has no jurisdiction, are spoken of, those only are referred to that are expressly withdrawn from them. They are enumerated in § 54 of the Code, and do not embrace an action of trespass on lands, unless when title comes in question.

This was the construction given to the provisions of the Code, to which reference has been made by the general term of the first district, in *Blank agt. Westcott*, (7 Abb., N. S., 225), and by the general term of the second district in the same volume, 433).

The order of the special term must be affirmed, with \$10 costs.

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N. Y. SUPERIOR COURT.

CYNTHIA J. STAFFORD, administratrix, &c., respondent, agt.
JEREMIAH LEAMY, appellant.

Although the rule of evidence seems to be settled that if testimony for a plaintiff, being unimpeached, is to be believed, that testimony for the defendant, which does not conflict with the plaintiff's testimony, and is also unimpeached, must be equally believed; yet where there appears in the case anything which tends to the impeachment of the witnesses' credibility, such as want of intelligence or of memory—not that it is necessary to find the testimony false—the finding of the referee, court or jury will not be disturbed as to the fact, any more than a finding in regard to any other fact in the case.

Therefore *held*, that if in the testimony of the defendant's witnesses in this case, there were anything which tends to impeachment of their credibility, the referee must be supported in disregarding their testimony.

The referee having found substantially that the allegations of the complaint were sustained by the evidence of the plaintiff's witnesses, and that the allegations of the answer were not sustained by the defendant's evidence—Judgment for plaintiff affirmed.

General Term, January, 1872.

THIS action was brought to recover the value of legal services rendered by plaintiff's intestate William R. Stafford. The answer admitted the rendering of certain services, and alleged that various payments were made by defendant, and that in December, 1864, an account was stated between Stafford and the defendant, and that it was found that the defendant owed twenty dollars, which he paid, and which was accepted by Stafford in full settlement for his services.

The action was referred to Chas. M. Marsh, Esq. On the trial the plaintiff proved the value of the services and admitted that the sum of one hundred and ten dollars had been paid on account thereof.

The only evidence introduced to prove the account stated, set up in the answer, was the testimony of two sons of the

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defendant, who testified that they were present at a conversation between Stafford and defendant, in which Stafford said that twenty dollars was due him for past services, that the defendant thereupon paid it, and it was accepted by Stafford in full for all the services he had rendered.

An exception was taken by defendant to a refusal to strike out the testimony of a witness for plaintiff, who, during his examination, referred to entries in registers and diaries in his and Stafford's handwriting.

The referee reported in favor of plaintiff, and from the judgment entered thereon the defendant appealed.

OTIS T. HALL, *attorney, and*
GEORGE H. YEAMAN, *counsel for appellants.*

I. Judgment should be reversed, because the referee gave it for full amount demanded in complaint, although defendant proved, and referee found, that defendant had paid more than the credits stated and admitted in the complaint.

II. Because referee refused to exclude the testimony of John J. Post, given by reading from documents not in the handwriting of witness, and from entries not originally made by him. An objection not discovered, except on cross-examination, and therefore made as soon as it could be. (*Cowan's Treatise*, § 1,491, and cases there cited.)

III. Because there was full proof of an account stated, as pleaded in the answer, and of payment of the amount so found due.

Any admission or acknowledgment of the sum or balance due, made by either party, and acquiesced in by the other, is an account stated. (*Bouv. Law Dict., Account*; 2 *Greenleaf's Ev.*, 9th ed., 127; *Addison on Contracts*, 69, 2d *Am. Ed.*, 2 *Mod.* 44; *Towman agt. Hunt*, 1 *T. R.*, 42; *Knox agt. Whaley*, 1 *Esp.*, 159; *Dawson agt. Remnant*, 6 *Esp.*, 24.)

There is no case holding that it must be in writing; and

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that it may be verbal see *Saunders's Plead. and Ev.*, Vol. I., 46.)

The case of *Hendrickson* agt. *Beers* (6 *Bosw.*, 639) is only as to the effect of a "receipt in full," for a less sum than due, and was a case of money lost at play; morality and public policy, inclining the courts to the plaintiff.

The case of *Geary* agt. *Page*, (9 *Bosw.*, 290,) is only the case of a promise to discharge, on something further to be done, and has no relation to this question.

IV. The defendant's proofs of payment, above referred to, are wholly uncontradicted. Witness, Post, could only say that he did not know of its being paid, and did not see the Leamys in the office at that interview. This is a fair summary of the negative testimony of one witness, offered against the positive testimony of two.

The payment is corroborated by the great lapse of time between the last business and interviews proved, and the death of Stafford, more than two years, in which no suit was brought or demand made.

It is proved by the statement of defendant, elicited by the plaintiff on cross-examination, by asking witness, Joseph Leamy, what his father said when he was sued. When the summons came "he said he didn't know what it came for; he didn't owe anything." Having asked for the statement, which defendant could not have done, plaintiff must accept it, and is bound by it.

There is no attempt at direct impeachment of the two witnesses, Patrick and Joseph Leamy, by whom payment is proved, but there is an attempt to contradict them on a minor and immaterial point, as to the location of Stafford's office in 1865; done with the view to discredit their other statements.

Upon this point Mr. Post's memory is proved to be at fault by the three Leamys and by Mr. Brannigan.

The testimony of the last witness is conclusive, and the

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veracity and the memory of Joseph and Patrick Leamy are fully sustained.

Finally, the referee himself has given credit to these witnesses, by finding that the defendant had paid in all one hundred and thirty dollars, instead of one hundred and ten dollars, as admitted in the complaint. This is by adding the twenty dollars to the one hundred and ten dollars. Now these witnesses have never spoken of that twenty dollars, except as a final settlement and full payment, after a discussion of the accounts between the parties.

Why we should be asked to accept their testimony as to payment of that sum, and reject it as to the facts, circumstances and agreement accompanying the payment, is not perceived.

ALFRED ROE *and* JOHN J. MACKLIN, *counsel for respondent.*

This action was brought to recover the value of legal services, rendered by William R. Stafford to defendant.

It was proved that services were rendered the defendant from the year 1861, to the spring of 1865, and that the services were worth more than the plaintiff claimed.

No testimony was offered by defendant as to any payment, except a payment of \$15 in January, 1865, and \$20 in February, 1865.

It was claimed that this payment of \$20 was made and received by plaintiff's intestate in full for all services rendered up to that time. The only testimony to prove this was, that of the defendant's sons.

They testified, that at the time this money was paid, a suit of Wianda against defendant was mentioned. It was proved that services were rendered in this suit about the time this alleged interview took place, and that the value of such services was \$20.

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The referee reported in favor of plaintiff, and judgment was entered thereon, from which defendant appeals.

I. There was evidence to show that the settlement and account stated, set up in the answer, were never made.

The only evidence tending to prove it was that of the defendant's sons.

They were contradicted on this point by Post, a disinterested witness.

The court will see, on examining the testimony of the defendant's witnesses, that they both testified to the same words being used at this interview, and contradicted each other as to what took place before and after this interview, and the testimony of each is inconsistent with other parts of their testimony.

They say that the Wianda suit was mentioned, and it was proved that the services in this suit were worth the exact sum paid.

They are directly contradicted by Post, who testifies to a conversation occurring subsequently to the time mentioned by the other witnesses, in which defendant asked Stafford how much he owed him, and Stafford said \$1,000.

Post was not contradicted. The evidence as to the location of the rooms and the situation of the offices was immaterial.

II. Where there is any evidence to sustain the findings of a referee the judgment will not be reversed.

It is only where the finding is clearly against the weight of evidence that a judgment will be reversed (*Thompson agt. Mack*, 22 How., 435; *Hoyt agt. Hoyt*, 8 Bosw., 511; *Morris agt. Second Ave. RR. Co.*, 8 Bosw., 679).

It is not enough that the appellate court might have come to a different conclusion upon the evidence.

The case of the appellant must be clear, and substantially without contradiction (*Morris agt. Second Ave. RR. Co.*, *supra*; *Polhamus agt. Moses*, 7 Robt. 289).

III. It must be presumed that the referee has found all

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the material questions of fact against the defendant, and against the defense set up in the answer (*Leffler agt. Field, 50 Barb., S. C., 40*).

It does not appear that he placed his decision on the ground that he believed the testimony of defendant's witnesses, and that he considered as matter of law, that it was insufficient to constitute an account stated.

No request to so find was made. It cannot be inferred from the fact that \$130 was paid.

It does not appear how that amount was arrived at.

Even if it be conceded, that the referee has found the payment of the \$20, he was at liberty to believe the testimony of the witness on this point, and reject the evidence as to the settlement (*Bradley agt. Ricardo, 8 Bing., 57; Beauchamp agt. Cash, Dowl & Ryl, N. P. Cas., 3; Wilkins agt. Earle, 44 N. Y. 182*).

To negative any such inference, he found that no account stated was had, which should be construed as a direct finding that no settlement was ever had.

It was a question of fact, whether the account was stated or not (*Lockwood agt. Thorne, 18 N. Y., 285, 288*).

IV. If the question whether the evidence of defendant, if uncontradicted, was sufficient to sustain the plea of account stated set up in the answer, should be considered by the court, it is submitted that the evidence was insufficient to establish such defense.

1. To constitute an account stated, the account must be reduced to writing, and examined by the parties, and the balance found due agreed upon (*Story's Eq. J., § 526; Story's Eq. Pl., § 798*).

Or the account must be rendered and the balance assented to, either expressly or by implication (*Lockwood agt. Thorne, 11 N. Y., 170; S. C., 18 N. Y., 285; Phelps agt. Belden, 2 Edw., Ch. 1*).

"Account is a detailed statement of items."

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"Stated," an agreed balance of accounts (*Bouvier Law Dict.*)

The making a stated account was so deliberate an act, that formerly the court would not allow it to be opened, and it is only in cases where error, fraud or mistake were clearly shown, that either party was allowed to question it (*Slee agt. Bloom*, 20 *Johns.*, 669).

No such rule is applicable to cases where the only evidence is an oral admission that a certain sum is owing, and its payment.

It is entitled to no greater consideration than the admission of any other fact.

It will be found, on examining the cases holding, that an oral admission of indebtedness is sufficient to establish this defense, that the courts deviated from the former meaning of an account stated, to prevent a failure of justice, by reason of the facts proved not conforming strictly to the special counts (*Porter agt. Cooper*, 4 *Tryw.*, 459; and see *Prowling agt. Hammond*, 8 *Taunt.*, 688; *Slatterlee agt. Pooley*, 6 *M. & W.*, 664; *Singleton agt. Barrett*, 2 *Compton & Jervis*, 368).

In *Elmes agt. Mills*, (1 *Hy Black*, 64), this rule is stated to have been founded upon *Buller N. P.*, 129, and the only authority referred to by Buller is, *May agt. King*, (12 *Mod.*, 539; and see also *Bump agt. Phenix*, 6 *Hill.*, 308).

In this case the account was reduced to writing, balance found due and paid, and a plea of account stated was held bad on demurrer, the court holding that it should have been pleaded as a payment, and see *Rolls agt. Barnes*, (1 *W. Black*, 65)

It will be found that in all of the cases in this country in which the question has arisen, accounts were reduced to writing, and their correctness admitted either expressly or by implication.

2. It is, therefore, submitted that this defense ought to have been pleaded as a payment.

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(a.) It did not constitute a payment.

It is a settled and established rule, that the payment of a less sum is not a satisfaction of a greater (2 *Parsons on Con.*, 618; *Hendrickson agt. Beers*, 6 *Bosw.*, 641).

In action on *quantum meruit*, if it might have been brought to recover a specific sum, the rule applies (*Wilkinson agt. Byers*, 1 *A. & E.*, 106).

V. The motion was properly denied (*Marcley agt. Shults*, 29 *N. Y.*, 346).

No objection was made at the time the witness referred to the books.

It was too late to object when the evidence was in.

Besides, the evidence, of Post showed that the value of the services stated by him, without reference to any memoranda, was more than the plaintiff claimed.

VI. The motion to close the case was properly denied.

The defendant put in issue the rendering the services and their value, and the plaintiff clearly had the affirmative (*Fry agt. Bennett*, 28 *N. Y.*, 324).

VII. The judgment should be affirmed.

By the Court, SEDGWICK, J.—The complaint alleged that the intestate, at the request of defendant, rendered services as attorney and counsel to him of the value of \$886 65, from July 1st, 1861, to 15th April, 1867, and that the defendant had paid on account of such services the sum of \$110, leaving due \$776 65.

The answer put in issue the value of the services set up, that from the 1st July, 1861, to 29th November, 1864, the defendant paid to the intestate "divers sums of money, as the same were demanded by said William Stafford, amounting in all to the entire amount of the indebtedness of the defendant to him, which was, as defendant believes, nearer than the sum of six hundred dollars."

The answer further alleges that about the 29th of November, 1864, an account was stated between the intestate and

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the defendant, and that on such statement twenty dollars was found due to the intestate, which the defendant paid to him, and was received by him in full settlement of all his claims and demands whatsoever against the defendant.

It is not necessary to determine what were the issues made by this answer, for the reason that the referee, relying on the testimony for the plaintiff, found substantially that the allegations of the complaint were sustained by the evidence, and that the allegations of the answer were not sustained by the evidence.

The plaintiff proves the services and their value to an amount greater than that stated in the complaint. The defendant sought to prove by two witnesses, sons of the defendant, that in January, 1865, or 1866, or 1867, or the middle of February, 1865 (all these dates being testified to this point by these witnesses), the intestate had said to the defendant that only twenty dollars were due for all services for law, and that this had been paid.

The plaintiff's witnesses may have been correct in all their testimony, and it was not inconsistent with the testimony for the defendant that at a certain time the intestate admitted that a payment of twenty dollars would be in full of all that was done for legal services. If, from all the facts in the case, it might be inferred that this was after the performance of all the services set out in the complaint, that a further inference would be that the intestate had been paid for all services except to the amount of twenty dollars. The position of the defendant is, that the defense did not conflict with the facts stated by the plaintiff's witnesses, and on being uncontradicted, should have been found by the referee to be true.

And it seems clear that if testimony for a plaintiff, being unimpeached, is to be believed, that testimony for the defendant, which does not conflict with the plaintiff's testimony, and is also unimpeached, must be equally believed. This is stated in *Lomer agt. Mecker*, (25 N. Y. R., 363.)

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"The witness," who testified for the defense, was not impeached or contradicted. His testimony is positive and direct, and not incredible upon its face. It was the duty of the court and jury to give credit to his testimony. The positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by court or jury arbitrarily or capriciously. (*Seibert* agt. *Erie R. R. Co.*, 49 *Barb.*, 587.)

This does not take from the jury, or judge acting as a jury, the province of determining in all cases if witnesses are credible, but it implies that witnesses presumptively testify correctly, and unless something appears in the case as a basis of a judgment to the contrary, it is the duty of the tribunal to find that the witness is credible.

If there appears in the case anything which tends to the impeachment of the witness's credibility, the finding of the jury or referee will not be disturbed as to the fact, any more than a finding in regard to any other fact in the case. For instance, in *Lomer* agt. *Meeker*, the opinion of the court states that the witness was not contradicted, and that the story he told was not incredible upon its face, and that the evidence was clear. In *Conrad* agt. *Williams*, (6 *Hill*, 447,) Judge BRONSON, as to the part of that case which rested on the testimony of one uncontradicted witness, says the credibility of that witness was a question for the jury, meaning that, although the jury discredit her, if they had discredited her, the finding would have been sustained. There is no reason to say that impeachment or contradiction must come from witnesses opposed to the witness whose credibility is in question. An important office of cross-examination is to show that the witness contradicts or impeaches himself, or that he gives testimony not credible upon its face. (*Lomer* agt. *Meeker*, *supra.*) Therefore, if in the testimony of the defendant's witnesses in this case, there was anything which tends to impeachment of their credibility, the referee must be supported in disregarding their testimony.

And there were circumstances upon which the referee

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had to pass in that regard. The witnesses were sons of the defendant, testifying to an interview with a deceased man. One of these sons gave in his first examination two different years in which the interview took place, and said no one was present with the deceased but the witness and his father, the defendant; on being recalled by the defendant, he named another year as the right one, and said his brother and another young man were present besides his father and himself, and said that since his last examination he had looked over different memoranda, not in writing, but memoranda in his mind. The brother testified that the two brothers, another young man, and defendant—there being no reason given for such a crowd of spectators—went to the interview; and as to what was said in the interview, both these witnesses give vague and conflicting statements. These and other matters of detail that appear in the case were facts upon which the referee properly reflected in determining whether these witnesses were to be relied on, and his conclusion upon them should not be disturbed. It was not necessary to conclude that these witnesses have testified falsely. A want of intelligence or of memory on their part that incapacitated them from representing a past event so that reliance could be placed upon them would lead to the same result.

Moreover, it does not appear in the printed case that the settlement said to be made was after the performance of the services in controversy, as testified to by plaintiff.

The complaint stated that the defendant had paid on account of services \$110, and the plaintiff gave no testimony as to the payment of more. The defendant proved no payment, excepting of the twenty dollars, when it was said by these two witnesses there had been a settlement in full. The referee, however, found that the defendant had paid on account \$130, and the appellant's counsel urges that nothing in the case accounts for the referee adding \$20 to the payment admitted by complaint, except the testimony given by the two witnesses; he must have credited them as to the fact

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of paying the \$20, and he should, therefore, have believed all the testimony, as he believed that part of it. This is not a correct conclusion. He had the right to believe part and reject part. He may have thought they could be relied upon as to the bare fact of the payment of \$20, when they could not be relied on to give a satisfactory account of a conversation which lasted from one half of an hour to an hour, but which they condensed to one or two short sentences.

Plaintiff's witnesses gave testimony after looking at certain books, some of which were and some of which were not in his handwriting, and which he testified "refreshed his memory." Defendant's counsel moved to strike out the testimony.

The referee was correct in denying the motion.

The testimony thus given was from witness's memory, and like other legal testimony in that respect.

Judgment should be affirmed with costs.

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SUPREME COURT.

THE PEOPLE *ex rel.*, JAMES F. JOHNSON, *et al.*, agt.
RUSSEL MARTIN.

After the term of office of a supervisor has expired, and another person has succeeded to the office, a writ of *mandamus* will not lie to compel the former to meet and account with the justices and town clerk of the town, under the provisions of the Revised Statutes (1 R. S., 349, § 4).

The remedy of the town is by action upon the supervisor's bond—or by action in the supreme court in the name of the town, under chap. 534, laws of 1866, to compel them to account, and for the recovery of any money or property of the town which he has not duly accounted for.

Mandamus, does not lie when other legal remedies afford adequate redress.

Cattaraugus Special Term, February, 1872.

DEMURRER by plaintiffs to defendant's return to alternative *mandamus*.

The defendant was elected supervisor of the town of Olean, Cattaraugus county, in February, 1869, for one year, qualified and acted as such until the annual town meeting in February, 1870. During his term he received money and property belonging to the town, but has failed to account for the same or to disburse such moneys, and the same or a portion thereof remain in his hands. He neglected and refused to account with the justices of the peace and the town clerk, on the Tuesday next preceding the annual town meeting in 1870, as required by the statute. An alternative writ of *mandamus* reciting such opinion was obtained by the justices and town clerk, in May, 1871, requiring the defendant to meet and account with them on the 20th day of May, in that year, or to show cause, &c.

To this writ the defendant has made return, not denying any allegation of the writ, but admitting his election as

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therein stated. He alleges, that in February, 1870, another person was elected, qualified and acted as supervisor of his town, and that he defendant gave the official bond with approved sureties as required by statute—and that since the expiration of his term he has not been elected, nor acted as supervisor. The return further states, that in February, 1870, the board of town auditors consisted of two or more justices of the peace, and one Stowell, town clerk—that in February, 1870, Stowell was succeeded by one Johnson as town clerk, who again was succeeded in February, 1871, by one Smith, whereupon defendant submits that the writ and proceedings should be dismissed.

To this return plaintiffs demur on the ground that it constitutes no defense.

The supervisor's duties declared by statute are as follows:

He shall keep a just and true account of the receipt and expenditure of all moneys which shall come into his hands by virtue of his office, in a book provided for that purpose, at the expense of the town, and to be delivered to his successor in office (1 *Rev. Stat.* 349, § 3).

On the Tuesday preceding the annual town meeting he shall account with the justices of the peace and town clerk of the town, for the disbursement of all moneys received by him (*Id.* § 4).

At every such accounting the justices and town clerk shall enter a certificate in the supervisor's book of accounts showing the state of his accounts at the date of the certificate (*Id.* § 5).

The justices of the town or a majority of them and the town clerk, shall on the Tuesday preceding the annual town meeting, in each year, examine and audit the accounts of the supervisor for moneys received and disbursed by him. The accounts, so audited, shall be filed in the office of the town clerk, as above provided (*Id.*, 355, § 49).

The amendment of 1866, to the above section 5, is given in the opinion.

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J. B. FINCH, *for plaintiffs.*

D. H. BOLLES, *for defendant.*

LAMONT, J.—The plaintiff's counsel relies upon the act of 1866, (*chap.* 534), as furnishing authority for this proceeding by *mandamus*, to compel the defendant to meet and account with the justices of the peace and town clerk of Olean, for the disbursement of moneys received by him as supervisor. This is the specific duty which the alternative writ commands the defendant to do, or to show cause to the contrary.

It was the duty of the defendant to have had an accounting with these officers on the Tuesday preceding the annual town meeting held in February, 1870. Such is the command of the statute, for a wilful neglect to perform which, the defendant would be liable to indictment for a misdemeanor (2 *Rev. Stat.* 696, § 38).

Such accounting consists, not in paying over any money or delivering any property, to the auditing board, or to other officers, for the supervisor's term at that time is not ended; but he is to show the condition of the town funds and property in his hands, the disbursement of moneys received, and the state of his official accounts.

The board of audit place in the supervisor's book a certificate showing the state of the accounts at that time. The audited accounts are to be filed with the town clerk, for the inspection of any of the inhabitants of the town, and to be read at the town meeting, if required on that occasion (1 *R. S.*, 355, § 48, 49).

No doubt, that duty of the supervisor may be enforced by *mandamus*, while he still continues in office, unless some other adequate remedy has been provided by the law for such delinquency. The writ of *mandamus* was originally devised, and is still resorted to, to supply a remedy in cases of this sort—where the law proves otherwise defective, and inefficient, and this is especially the case where public officers neglect to perform a clearly defined public duty.

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It is also a general, if not universal rule, that the writ of *mandamus* does not lie where other adequate legal remedies exist (*People agt. Supervisors of Chenango*, 11 N. Y., 573).

The office of the defendant as supervisor expired in February, 1870. This writ was not issued until May, 1871. The defendant has now (March, 1872) been out of office above two years.

The peremptory writ, when allowed, must follow the command of the alternative one—and in the present case, that command is that the defendant meet the justices and town clerk, and account with them on the 20th day of May, 1871, a time already past. Of course, this is impossible. The court, however, might, and would if necessary, allow an amendment in this respect, in both writs (*Code* § 471).

The justices and town clerk form a special board of audit, to examine the supervisor's accounts, and the statute has fixed the day of their meeting for this purpose, on Tuesday next preceding the annual town meeting (1 R. S., 349, § 4).

In the *People agt. Auditors of Westford*, (53 Barb., 555), the court was of opinion, that the board of town auditors could not lawfully meet and perform the duties of such board on any other than the statute day. Not being authorized like boards of supervisors to hold special meetings.

If, then, a *mandamus* could be awarded in this case, the accounting by the defendant, could not be had before this board, until February, 1873, and then the defendant by virtue of his writs could be required only to show how his accounts as supervisor stood in February, 1870, without paying over a penny to anybody. This, under the circumstances, would seem to be but a very defective remedy.

Now, the act of 1866, supplies to the town of Olean, a complete and effectual remedy, embracing not only all that could be obtained by *mandamus*, but a recovery of any money or property of the town which the defaulting supervisor has not duly accounted for (*Laws of 1866, chap. 534*).

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The act gives to the town in its corporate name, the character of plaintiff, in an action in the supreme court, to be instituted and conducted by the same officers who can force the board to audit the supervisor's accounts. In such action, these officers in the name of the town, may compel the defendant to render the very account in question, and, moreover, may, at the same time obtain judgment for the money and property coming to the supervisor's hands, for which he has failed to account.

Whatever, therefore, might have been the propriety of a *mandamus* in this case, independently of the act of 1866, certain it is, that by this statute, a completer and better remedy has been given to the town, than could be reached by a *mandamus*—and if so, then clearly the resort to a *mandamus* should be denied.

It is claimed, however, by the plaintiff's counsel, that the writ of *mandamus* is one of the remedies given by the statute of 1866. It is not given by name, and, I think, it is excluded by the very terms of the statute—the act reads as follows: "If any supervisor shall neglect to account or shall render a false account, or shall convert to his own use any money or securities which may come to his hands by virtue of his office, proceedings may be commenced against him, in the name of the town of which he is supervisor, in the supreme court, by action or otherwise, by the justices of the peace and town clerk of said town, to compel him to render such account or to recover any money or property of the town which he has not duly accounted for."

It is clear, that under this statute, whatever action or proceeding is instituted must be in the name of the town. This language cannot embrace the writ of *mandamus* which must, in all cases run in the name of the people.

Mandamus is a writ issuing in the *name of the sovereign*. (*Bouvier's Law Dic., word Mandamus.*) It is a command issuing in the *king's name, &c.* (3 *Black*, 110.)

In a recent case in the Court of Appeals it is said: Inas-

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much as the people themselves are the plaintiffs in a proceeding by mandamus, it is not of vital importance who the relator should be so long as he does not officiously interfere in a matter with which he has no concern. The office which a relator performs is usually the initiating a proceeding *in the name of the people* and for the general benefit, &c., &c. (*People agt. Halsey*, 37 N. Y., 348.)

I conclude, therefore, that a mandamus, if otherwise appropriate, is not authorized by the law in question. But if the language of this act has been comprehensive enough to include such a proceeding, it would still be denied in the present instance, because of the better and fuller remedy given by other legal proceedings, according to the established rule that the writ of mandamus shall not be allowed when a complete remedy is given by action.

Mandamus lies only when other adequate legal remedies fail (*Fish agt. Weatherwax*, 2 Johns. Cas., 217-1 and § 3 of the elaborate note to that case,) and not always then. In the array of judicial powers the writ of mandamus is regarded as an auxiliary, to be called into action when the regular forces prove unequal to the emergency, and supplements some defects in the administration of justice. Again, the official bond of the supervisor, with sureties, will in most if not all cases afford the town sufficient means of indemnity against a delinquent officer. The bond is conditioned for the faithful discharge of the official duties of the supervisor, and well and truly to keep and pay over and account for all moneys belonging to his town and coming into his hands as supervisor. (*Laws of 1866, chap. 534, § 2.*) This seems to cover the entire field of official duty. The first clause of the condition makes the supervisor amenable for misappropriation, or embezzlement, or falsely accounting, or failing to account, or for refusing to pay over moneys as required by law. (*Alleghany Co. agt. Van Campen*, 3 Wend., 48.)

As to the matters stated in the return, it is not perceived how a change in the town clerkship could aid the defend-

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ant. The justices and town clerk, who ever they may happen to be, constitute the proper auditing board to examine supervisors' accounts. I think, also, that a careful consideration of the question would be called for, if a decision on the point was necessary in this case, before conceding that the expiration of the defendant's term of office would shield him against a render of his account as he ought to have done before his term expired. It has been held that a mandamus lies to compel a town clerk to deliver the records to his successor; to a removed clerk of a county court to deliver up the records and seal of the court; to compel overseers to deliver up parish books to their successors; to compel a removed clerk to deliver up books of a public corporate company; to overseers and guardians to pass their accounts. (*See note to Fish agt. Weatherwax, supra, citing the cases.*)

This proceeding to compel delivery of records, books and papers to an officer's successors would fail in this State, for the reason that our statute has given a more summary remedy which applies to supervisors (1 *Rev. St.*, 358, § 5-9), but the cases show that ex-officers may be compelled by mandamus to perform some duties pertaining to their office after the expiration of their official term. It is not necessary in the present case to determine whether the return is sufficient, for on this demurrer the defendant may go back of his return and attack the alternative writ. If that is bad in substance the plaintiffs must fail. (*People agt. Supervisors of Fulton*, 14 *Barb.*, 52; *People agt. Baker*, 35 *Barb.*, 105; *People agt. Ransom*, 2 *Coms.*, 490.) The writ is substantially defective when better remedies are given by action. The peremptory writ must be denied for the reasons stated, and the alternative writ dismissed. As costs in this case are in the discretion of the court, I think none should be allowed.

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N. Y. COMMON PLEAS.

JOHN G. HAVILAND, *et al.* agt. LOUISA DONAI WEHLE.

An action cannot be commenced in the *marine court* of the city of New York (nor in a justice's court) against a *resident defendant*, by *short attachment*.

*General Term, January, 1872.**Before DALY, Ch. J., ROBINSON and LOEW, JJ.*

APPEAL by the plaintiffs from a judgment of the marine court, at general term.

On the 8th day of December, 1869, these plaintiffs and others, commenced thirteen actions against the defendant, by attachments returnable two days thereafter.

Under these attachments the plaintiff removed all the defendant's goods from her store.

Subsequently said attachments were all vacated and set aside by the court, on the ground that they should have been long, instead of short attachments, the defendant being a resident of the city of New York.

As precisely the same question was presented in each of the said thirteen suits, the attorneys for the respective parties entered into a stipulation, whereby it was agreed, that the proceedings in the present suit only, should be printed, but that the decision rendered in this case should also apply to the twelve other suits, and that the same judgment should be entered in all.

The general term of the marine court having affirmed the decision of the justice vacating the attachments, the plaintiffs appealed to this court.

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DUBOIS SMITH, *for plaintiffs and appellants.*

CHARLES WEHLE, *for defendant and respondent.*

By the court, LOEW, J.—The only question presented for our consideration on this appeal is, whether or not an action can be commenced in the marine court, against a resident defendant, by short attachment.

Section 34 of the act to abolish imprisonment for debt (*Laws of 1831, Chap. 300, § 34*), under which this attachment was issued, provides that in addition to the cases in which suits could be commenced by attachment, at the time of the passage of that act, any suit for the recovery of any debt or damage arising upon any contract express or implied, or upon any judgment, may be so commenced whenever it shall satisfactorily appear to the justice, that the defendant is about to remove from the county any of his property, with the intent to defraud his creditors, or has assigned, disposed of, or secreted the same, or is about to do so, with the like intent, whether such defendant be resident of this state or not.

That the allusion in this action to some other attachment, has reference to the long attachment provided for in article 2, title 4, chap. 2, part 3 of the Revised Statutes, and not as contended by plaintiff's counsel, to the short attachment by which suits are to be instituted against non-resident defendants, and which is authorised by section 33 of the non-imprisonment act, is I think, very clear, and especially so when it is considered that the said act, although passed April 26th, 1831, was by the terms of the last section (§ 48) not to take effect till March 1st, 1832.

That the legislature designed by said section to extend the class of cases in which long attachments could then issue, still further appears by the thirty-sixth section of the said act, which directs that every attachment issued by virtue of said act, or of the provisions contained in the said second

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article of the Revised Statutes, shall be served in the manner in said article provided, except that if the defendant can be found in the county, the copy of such attachment and inventory shall be served on him personally, instead of leaving the same at the place prescribed in said article.

Now, it is plain, I think, that the word *serve* as used in the last mentioned section is equivalent to, and was intended by the legislature to signify precisely the same thing as the word *execute*, as used in the said second article of the Revised Statutes.

The two words are used indiscriminately in said article, as will become manifest by reference to the thirty-first section which directs, that the officer to whom the attachment shall be delivered "shall execute the same," &c., and the thirty-fifth section which requires, that "the constable serving the attachment shall," &c.

In addition to this, the thirty-third section of the non-imprisonment act declares in terms, that the short attachment authorised by said section against non-resident defendants "shall be served at least two days before the time of appearance mentioned therein."

It is thus apparent, that when the thirty-sixth section of the same act declares that every attachment issued by virtue of said act, shall be served in the manner in said article provided, it means that every such attachment shall be served or executed at least six days before the return day as provided in section 31 of said article, except where a shorter time is expressly directed by section 33 of the non-imprisonment act, in regard to the attachment to be issued against a non-resident defendant.

If however, any doubt could still exist, as to whether an attachment issued by virtue of the provisions of the non-imprisonment act, should be made returnable, and served or executed as in said article provided, the same is, I think, effectually removed by other provisions of said act which ap-

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pear to have escaped the attention not only of the counsel on either side, but also of Mr. Justice HOFFMAN, who delivered one of the opinions in the case of *Fallon agt. McCunn*, (7 *Bosw.*, 141).

By section 43, it is enacted that, all the provisions of the said fourth title of the Revised Statutes, not expressly repealed by said act, and not inconsistent with the provisions thereof, shall be in full force, and shall apply to the provisions of said act, so far as the same relate to proceedings in courts of justices of the peace.

Now, as the provisions of the second article of said title relative to the manner in which the attachment therein provided for shall be executed, &c., have not been repealed by and are not inconsistent with the provisions of the non-imprisonment act—in so far at least as the attachment provided for by the thirty-fourth section thereof, relates to resident defendants—the same have, in my opinion, by virtue of the said forty-third section, the same force and effect as respects justices courts, as if they had been incorporated in, and made a part of said act, by being rendered *in haec verba*.

Hence it follows, that the forty-seventh section, which declares that the provisions of said act from the twenty-ninth section inclusive (which, of course, includes the forty-third section) shall apply to executions, warrants, and other process issued by the marine court, and to all proceedings in said court, in the like cases, and in the same manner as therein provided in respect to justices of the peace, makes the provisions of said article equally applicable to that court.

It seems to me, therefore, to be beyond question that the attachment provided for by the thirty-fourth section of the non-imprisonment act, must, when issued against a resident defendant, be returnable in not less than six nor more than twelve days from its date, and must in all respects (except as otherwise directed by the thirty-sixth section of said act),

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be served or executed in accordance with the provisions of said second article of the Revised Statutes.

As the attachment in question was not so returnable, the same was unauthorized and void, and was properly vacated.

The judgment of the marine court must, therefore, be affirmed.

DALY, Ch. J., and ROBINSON, J., concurred.

In the matter of Zinn.

U. S. SUPREME COURT.

In the matter of WILLIAM G. ZINN and others, bankrupts.

The mere fact of *relationship* in the ninth degree, or a less degree, on the part of a proposed *trustee* to a bankrupt or to a *creditor*—even the largest in amount of a bankrupt, or to a proposed member of the *committee* to such creditor or to the *bankrupt*—cannot be regarded as a disqualification, independent of any other facts which might concur with such relationship to make a confirmation of the resolution under section 43 of the Bankrupt act improper. (*This seems to overrule the decision in this same case.* 40 How., 461.)

Southern District of New York, February, 1871.

J. S. L. CUMMINS, *for the resolution.*

A. C. FRANSIOLI, *for the opposing creditor.*

BLATCHFORD, J.—IN this case at the first meeting of creditors, eight creditors, who had proved their claims and whose claims amounted in the aggregate to \$332,712 68 and to three fourths in value of the aggregate amount of all the claims proved, subscribed, under section 43 of the act, a resolution that it was for the interest of the general body of the creditors of the bankrupts that the estate of the bankrupts should be wound up and settled and distribution made among the creditors by trustees under the inspection and direction of a committee of the creditors, and nominating John H. Wyman as trustee and Samuel Wyman, jr., Henry Almy and George C. T. Seaman as the committee. Among the eight creditors are Herman D. Aldrich, to the amount of \$188,866 88, who signs by the said Samuel Wyman, jr., as his attorney; the said Samuel Wyman, jr., to the amount of \$14,985 36; the said George C. T. Seaman, to the amount of \$64,942 45,

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and the firm of which the said Henry Almy is a member, to the amount of \$4,500. The said Herman D. Aldrich is the uncle of two of the bankrupts. The wife of the said Herman D. Aldrich is the cousin of the said John H. Wyman and the sister of the said Samuel Wyman, jr. The said Herman D. Aldrich is now in a lunatic asylum as a patient for his health, but has not been adjudged a lunatic by any legal proceedings, nor has any committee of his person or estate been appointed. The said Samuel Wyman, jr., acted as the attorney for the said Herman D. Aldrich in proving the said claim of the said Herman D. Aldrich and in voting for said resolution, in pursuance of a power of attorney executed by said Herman D. Aldrich in January, 1870, when he was of sound mind.

John H. Wyman, the proposed trustee, is, therefore, related by consanguinity and affinity in the fifth degree to Herman D. Aldrich, and in the ninth degree to the two bankrupts, who are the nephews of Herman D. Aldrich. Samuel Wyman, jr., is related by consanguinity and affinity in the third degree to Herman D. Aldrich and in the second degree to the two bankrupts, who are the nephews of Herman D. Aldrich, and in the fourth degree to John H. Wyman.

A creditor who has proved his debt, and who did not vote for or sign the resolution, objects to its confirmation by the court, on the ground of the relationships and the other facts thus stated.

The mere fact of relationship in the ninth degree, or a less degree, on the part of a proposed trustee to a bankrupt, or to a creditor, even the largest in amount of a bankrupt, or to a proposed member of the committee to such creditor, or to the bankrupt, cannot be regarded as a disqualification. Other facts, indeed, may concur with such relationships to make a confirmation improper. But, in the present case, there are no such facts. The three persons named as the members of the committee are all of them creditors, the aggregate of their claims being more than \$84,000. Samuel Wyman, jr.,

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is the attorney of the largest single creditor. The theory of the provisions of the 43d section is, that three-fourths in value of the creditors who have proved their debts shall designate the trustee and the committee. The persons designated in the present case are gentlemen of high character and standing, free from all reproach. Nothing appears to indicate that they will act in the interest of the bankrupts at the expense of the creditors. John H. Wyman and Samuel Wyman, jr., are more nearly related to the principal creditor than they are to the bankrupts. The trustee is required by the 43d section of the act to wind up and settle the estate for the equal benefit of all the creditors, and is at all times subject to the direction of the court in executing his trust. There is nothing to warrant the suggestion that the bankrupts procured the creditors to make these appointments, or that they are made in the interest of the bankrupts as against the creditors.

Mr. Seaman, although a resident of New Jersey, has a place of business in the city of New York, which he frequents daily.

The questions raised in regard to the power of attorney from Herman D. Aldrich to Samuel Wyman, jr., and to the insanity of Herman D. Aldrich, I do not consider, for the reason that if the claim of Herman D. Aldrich be stricken out from the signatures to the resolution, it must likewise be stricken out from the debts proved, and there would thus still be signatures to the resolution of creditors to three-fourths in value of the debts proved. Notwithstanding the appointment of a trustee and the assignment of the estate to him, the claim of any creditor may be investigated under section 22 and the bankrupt and other persons may be examined under section 26.

The resolution passed by the creditors will be confirmed when the register shall have signed the proper certificate under Form No. 63.

The People agt. McGuire.

SUPREME COURT.

THE PEOPLE of the State of New York on the relation of
JOHN A. STEMMLER, and JOHN A. STEMMLER, plaintiff,
agt. JOSEPH MCGUIRE.

A *special jury* will not be ordered to try the question of title, in the nature of *quo warranto*, to the office of *justice of a district court* in the city of New York, there being nothing in the circumstances to make it such an *extreme case* as would warrant a special jury.

Supreme Court Circuit, March, 1872.

Before Hon. JOHN R. BRADY, Justice.

MOTION for special jury.

This action, in the nature of *quo warranto*, was brought to try the title to the office of justice of the district court of the city and county of New York for the seventh judicial district, under section 432 of the Code of Procedure.

Plaintiff now moved for special jury.

NELSON J. WATERBURY, *for plaintiff.*

A. J. VANDERPOEL and E. R. MEADE, *for defendant.*

BRADY, J.—This is an important case so far as the parties are concerned, no doubt, and perhaps may present some incidents worthy the consideration of the people.

The controversy is not such, however, as ordinarily excites the attention, or provokes the prejudices of our population.

The office which the defendant holds, and the election to determine by whom it should be held, are local, and the interest felt in both must be regarded as confined to localities and not to extend to the entire city.

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If it were otherwise, however, it does not necessarily follow that this motion should be granted.

The litigation is between two individuals, although brought in the name of the people on the relation of Stemmler.

An examination of the cases bearing upon the propriety of ordering a struck or special jury, shows that the courts have generally refused to grant an application therefor.

In *Hartshorn agt. Gelston* (3 Cai., 84), the suggestion that the United States was interested in the controversy, did not, in the judgment of the court, make the case important.

In *Poucher agt. Livingstone* (2 Wend., 296), the motion was denied, although it was considered that the evidence of public interest in the matter in dispute was very strong, and the rule declared as illustrated by the authorities that where public officers have been libelled for acts done in their official capacity, the actions brought by them were deemed important, and struck juries allowed.

In *Patchin agt. Sands* (10 Wend., 570), the motion was based upon the allegation that the suit grew out of a long agitated controversy between the public officers of the village of Brooklyn, and upon the plaintiff's belief that there would not be a fair and impartial trial by jurors in the county of Kings.

The motion was denied. SUTHERLAND, J., said: "It cannot be believed that after the jury-box is properly sifted, twelve impartial men cannot be found in the county of Kings to try this case."

Parties deceive themselves in the estimate of the extent of interest which the public at large take in their controversies.

In *Nesmith agt. The Atlantic Ins. Co.* (8 Abb., 423), there had been a protracted trial, and a verdict for the plaintiff, but it was set aside. There had also been a second trial and the jury disagreed.

The motion was, nevertheless, denied. PIERREPONT, J., said that an impartial trial by a struck jury would be much less likely than in the ordinary way. That the court in the

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latter mode, would allow every juror to be tried on oath, before he took his seat, and if unfit would exclude him.

In *Walsh agt. The Sun Mutual Ins. Co.*, (17 Abb., 356), the cases are collected and reviewed.

The motion was made upon the alleged importance and intricacy of the case.

Its importance, involving a claim of \$15,000, seems to have been conceded, but the intricacy of the issues was not adjudged. The motion was denied. It was held that there was no precedent for granting the motion in such a case.

In the opinion, the manuscript case of *Giles agt. Flagg*, is referred to, but the decision in that case is not stated. I have not been able to find it, I think it must have been adverse to the granting of the order for a struck jury, inasmuch as it was referred to and relied on by Mr. Noyes, who opposed the motion in *Welsh agt. The Sun Mutual Ins. Co.*

It was declared that *Giles agt. Flagg*, was important, and of great public interest, and, doubtless, because it involved the question who should be comptroller.

It is evident, as intimated, if not substantially declared, in *Patchin agt. Sands (supra)*, that a struck jury will not be granted, except in extreme cases. This is not of that character in my judgment. I entertain no doubt, that an intelligent and unbiased jury may be impanelled in this case in the ordinary way, who, wholly uninfluenced by the nationality of either party, will act fairly upon the evidence given on the trial and decide accordingly.

It is by no means evidence of partiality or prejudice, that juries sometimes disagree.

This may well result from the conflicting character of the testimony given before them, and warranting different views. There are few elements of judicial life so embarrassing and productive of so much anxiety and delay as conflicting evidence.

Motion denied.

In the matter of Clark.

UNITED STATES DISTRICT COURT.

In the matter of ABRAHAM B. CLARK, a bankrupt.

On application by an attorney for compensation out of the fund in the hands of the assignee, for services rendered by him at the request of an involuntary bankrupt in and about defending against the petition, preparing schedules, &c. *Denied*. Upon the petition of an attorney to be paid for services rendered by him, out of the fund in the hands of the assignee, accompanied by the certificate of the register in charge that such services were beneficial to the estate, and that the amount claimed was reasonable and just, followed by the written approval of the assignee, the court will order payment accordingly.

Southern District of New York.

At chambers, 4 Warren street, in the city of New York, in said district, on the 9th day of January, A. D., 1872.

I, the undersigned, register in charge of the above entitled matter, do hereby certify and report that on the 27th day of October last a claim against the assignee of the said estate for professional services was filed with me by Mansfield Compton, Esq., amounting to the sum of \$1,000, upon the back of which said claim was indorsed the words and figures following :

"I the undersigned, object and disallow the foregoing claim, and require evidence to be produced to establish the same, and I apply to the register for an order for the examination of the claimant and his witnesses touching his claim. The said claim was presented to me this 27th day of October, 1871. John S. BEECHER, assignee of A. B. Clark, by C. W. Bangs, his attorney, *pro hac vice*," which said claim with said indorsements thereon are hereto annexed.

That on the 6th day of November, aforesaid, I received a written request from the said Bangs, reciting that said

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Compton had presented the claim aforesaid to the said assignee, and that he had been served with a notice by said Compton, that the examination of said claim would be proceeded with, before the register, on the 8th day of November, 1871, at 11 A.M., and that he was advised that John J. Monell and Richard H. Corbett are each of them necessary witnesses for the assignee on the hearing of said claim, and applying for a summons or order for the examination of said witnesses returnable on the 8th day of November, at 11 A. M., at the office of said register, "and the assignee thereby raised the point, that it was the duty of the register upon said application to issue the summonses, or order thereby applied for, and that should the register decline to issue such summonses or order, the register was requested to certify to the court the point so raised"—which said notice is hereto annexed.

That I did not issue such summons or order as so requested not thinking it necessary to bring said Corbett or the said Monell down from his residence at Newburgh, on that day, for the reasons hereinafter stated.

That on the 8th day of November aforesaid, at 11 A.M., the said Compton appeared before me, and the said assignee also appeared by F. M. Bangs, Esq., his counsel. That the said Bangs thereupon asked for an adjournment alleging as a ground thereof, "that certain creditors had filed a protest against any attorney's fees being allowed the assignee, and that the assignee had taken measures to call the creditors together and had notified the protesting creditors, that they might if they chose employ attorneys and counsel to attend the trial of this claim, and that such protesting creditors did not appear, and that there was no proof that M. Compton had notified any of the creditors of his claim, that thereupon the assignee had not thought it expedient to employ counsel at his own expense nor to pledge the estate to meet such expenses"—Mr. Bangs further stated, that he appeared only for the purpose of making that point.

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I overruled this application, stating as a reason therefor, that "I should not pay any attention to such a protest save to execute the accounts of the counsel carefully, and allow them for all services properly rendered to the estate, the full going prices usually charged by competent counsel for similar services. That I did not think that a ground of adjournment, and if the assignee did not take care of the estate by a proper defense, I should do my best to supply the omission."

The said Bangs thereupon renewed his application for a postponement of said hearing, alleging as a ground therefor, that "he had applied to the register for an order that the said Corbett and Monell appear as witnesses for the said assignee, on this hearing, and that said application had not been granted."

I denied this application also, stating as a reason therefor, "1. That the grounds alleged therefor, were not consistent with those above alleged for such postponement. 2. That M. Compton had informed me, that when he served the notice for this hearing upon Mr. Bangs, he was informed by him, that he should not dispute the amount of the bill, but only raise the point of law, and that M. Compton had also informed him, that his testimony would probably occupy the whole of one sitting." To this Mr. Bangs urged, that "the general orders required the register to sit six hours, and he denied, that it would require six hours, to take the testimony on the part of M. Compton."

I then decided that as Mr. Corbett had come in and was present, and could be examined by Mr. Bangs, if the time should permit, I would go on and take the testimony of the witnesses who were present as far as the same could be done at one session."

Thereupon Mr. Bangs, stated, that he now appeared for Hardy, Blake & Co., and "demurred to the bill on its face."

But I decided, that I would take the testimony and pass upon all these questions at the close of it.

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And thereupon Mr. Bangs proceeded to put his said objection in the nature of a demurrer to the bill of items of M. Compton's claim, into writing, and having done so, handed me two papers, both of which are hereto annexed, asking me to certify the point so raised to the court.

I decided that, "under the 11th general order the pendency of such an issue before the judge ought not to suspend or delay the proceedings in this case before the register. That it would not be a convenient practice to send the case up till the testimony was in, unless, indeed, it should be lengthy, in which case I might think it proper to send it up before;" and thereupon the said Bangs left. I therefore proceeded and took the testimony of the said Compton and the testimony of Balestier which are hereto annexed.

And I submit the two points above raised by the said Bangs, without comment.

And touching the said claim of the said Compton, I submit that I am unable to see, from the testimony, any privity of contract between the assignee and the claimant. The only ground upon which his claim can rest is, the provision of the act itself. The services claimed were, for resisting the petition filed against the bankrupt; for services while the bankrupt was under examination before register; for services in preparing schedules, and for other services in settling conflicting claims and rights between the bankrupt and the assignee. They are services that are rendered in almost every case of involuntary bankruptcy, and if allowed here, they must be allowed in every similar case. The question, therefore, becomes important, and with a view of obtaining a careful consideration of it, I beg to call the attention of the court to what it seems to me, must be the effect of rejecting this and similar claims.

The bankrupt's first notice of proceedings in bankruptcy against him is, the service of the order to show cause why he should not be adjudged a bankrupt.

The moment of that service, is the moment that fixes his

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status with regard to his property. That moment his property, if afterward adjudged a bankrupt, becomes the property of the assignee thereafter to be appointed. He has, therefore, nothing with which he may retain counsel, call witnesses, or assist himself in his defense; yet, the 41st section of the act provides, that he may appear in court and defend. It further provides that, in case he is successful in his defense, he may have costs of his antagonist. Clearly this implies the right—a right in virtue of the very terms of the act itself—to retain and be aided by counsel. There is no presumption of law that counsel will serve, or witnesses attend, without compensation. Where shall the money to defray such expenses come from? It must come from the property—what should be the assets—of the bankrupt. It will be taken before or after the adjudication. It will be taken either stealthily by the bankrupt, or openly by order of the court. There can be no doubt, as to which of these two courses will most promote the public interest and the wholesome administration of the law. It will not answer this view to say, that the law presumes all men honest, that the law will not presume that a man will commit a fraud or violate a law. It is enough to say, that good legislation will not place a man under temptations to commit a wrong, which experience shows the mass of mankind have not the virtue to resist.

It is true, we must submit to the law as we find it; but I think it clear, that if the bankruptcy act will bear the construction contended for, it ought to be adopted.

Upon the question then of the true construction of the act, it would seem, that congress must have intended that the costs and expenses of the bankrupt in his defense, and other proceedings should be paid out of the proceeds of his estate.

A court will be reluctant to hold, that the law making power while expressly providing, that a party may appear in court and defend himself by the aid of counsel and witnesses, intended in the same act to deprive him of all the

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means of doing so. The fact, that no provision is made for withholding from the assets to be handed over to the assignee sufficient to pay these costs and expenses, warrants us in looking sharply to the act to find from what source it was intended, that such costs and expenses should be paid. We find in section 28, a provision for paying out of the fund "the fees, costs and expenses of suits and the several proceedings in bankruptcy under this act." This language would seem to be broad enough to cover the case before us. The words "fees, costs and expenses" are not limited to the side of the creditors or the assignee nor yet, to the officers of the court. It is the daily practice of allowing the counsel for the petitioning creditor to be paid out of the fund, for his services in the bankruptcy court; on what express words of the act are similar fees for similar services denied to the counsel for the bankrupt? Certainly none. By whatever argument these words of the act are made to embrace the compensation of counsel for the petitioning creditor the same argument will apply *a fortiori* to the compensation of counsel for the bankrupt.

I submitted the question herein presented to this court in 1368, in the case of *Hirschfield*, (1 N. B. R., 195). In that case, the bankrupt's attorneys had not thought it right to take from the funds of the bankrupts their compensation in advance for filing his petition, &c., but had come in after the estate had gone into the hands of the assignee and asked to be paid from the fund. I then submitted to the court as a reason for allowing it, that "the funds from which the solicitor is paid must come from what should be the assets of the bankrupt, or from his future earnings. In pursuing the course here pursued, the solicitor submits the amount of his compensation to the court under the eye of the creditors. In the course ordinarily pursued, he obtains his compensation from the same fund, the amount being measured by the good feelings of the bankrupt, and under some temptation to give him a larger sum than the creditors would sanction, or the

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court might think a just compensation. If the act will bear this construction, it would seem to tend to a better practice than that which it is believed now generally prevails." I recur to these remarks now, only to say that the experience of three years has only deepened the impression then expressed—and since the case of *Comstock & Young*, (5 N. B. R., 191), in which one of our ablest judges has taken the same view here urged, I have thought it right to submit the question again, asking for a careful reconsideration of the question.

Should the court think the views here expressed, well taken, I recommend that an order be entered, allowing the claimant the sum of \$250 which, I think, would be a fair compensation for the services which would seem to come under provisions of the act, upon the principle of construction above contended for. Respectfully submitted, I. T. WILLIAMS, register in bankruptcy.

BLATCHFORD, J.—On evidence and a certificate bringing this case within the decision *In re Montgomery*, (3 Benedict, 364), I should follow that decision.

April 5th, 1872.

The decision in the case of *Montgomery*, above referred to, is as follows: BLATCHFORD, J.—“If the assignee shall, in writing, approve of the payment of this bill out of the funds of this estate on the grounds set forth in the petition of Mr. Olney, and in the certificate of the register, and of the amount of the charges, an order will be made allowing its payment.”

Moran agt. McClearn.

SUPREME COURT.

FRANCIS H. MORAN, respondent, agt. WILLIAM MCCLEARN, appellant.

Section 371 of the Code provides for a *modification* of the judgment appealed from—not a *reversal* of the judgment in determining the question of *costs*.

Where the appellant specified in his notice of appeal the grounds of the appeal as follows: 1. The judgment is against the weight of evidence. 2. It is not supported by the evidence. 3. On the evidence the plaintiff was not entitled to recover. 4. The judgment is contrary to law upon the evidence:

Held, that these grounds contained no specification in which the judgment should have been more favorable to the appellant, unless they be construed as claiming that it should have been in his favor, instead of being against him, which is equivalent to claiming a reversal, which is not contemplated by this section. It was a wholly useless proceeding.

Fourth Judicial Department, argued at Syracuse November, 1871. decided at Buffalo General Term, January, 1872.
Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.

By the court, MULLIN, P. J.—By section 371 of the Code, the prevailing party in judgments rendered on appeals, are entitled to costs in all cases, with certain exceptions, and limitations. The first of these exceptions or limitations is, that he is not entitled when the appellant shall in his notice of appeal, specify the particular or particulars in which he claims the judgment, should have been more favorable to him; if he thinks the judgment is for too much, he must specify what its amount should have been. The party recovering the judgment, must then serve on the appellant, an offer in writing to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. If the appellant accepts the offer, the judgment appealed from

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is to be corrected accordingly. In that event, no costs of the appeal are recoverable by either party.

If such offer be not made, or if made, is not accepted, and the judgment in the appellate court is more favorable for him than the judgment in the court below, or more favorable than the offer, he shall recover costs, provided, however, that the judgment be reversed on the appeal, or be made more favorable to the amount of \$10.

It will be seen, that in order to entitle the appellant to costs, he must specify in his notice of appeal the particulars in which he claims the judgment should have been more favorable to him. If he neglects to do this, he can in no contingency recover costs, unless he obtains judgment in his own favor in the appellate court.

Until he specifies these particulars, the respondent is under no obligation to make an offer to modify or reduce the judgment.

In this case, the appellant in his notice of appeal specifies the following as the grounds on which the appeal is founded, to wit:

- 1st. The judgment is against the weight of evidence.
- 2d. It is not supported by the evidence.
- 3d. On the evidence the plaintiff was not entitled to recover.

4th. The judgment is contrary to law upon the evidence.

There is not, in this notice, any specification of any particular in which the judgment should have been more favorable to him, unless it is to be construed as claiming that it should have been in his favor instead of being against him.

If it is to be thus construed, the condition of the appellant would not be altered, as a total reversal of the judgment of the inferior court, and the rendition of a judgment in favor of the appellant, is not contemplated by section 371 of the Code.

That section provides for a modification, not a reversal of the judgment. The judgment of the justice is to be cor-

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rected, and as corrected, is to stand as his judgment, and is to be enforced accordingly.

The respondent was not called upon to make an offer, and when one was made, the appellant was not bound to accept or reject it. It was not, and from the form of the notice of appeal, could not be an offer to modify the judgment, as no modification was suggested by the appellant.

It was, therefore, a wholly useless proceeding. Had the appellant accepted the offer, it might be the acceptance would have rendered it binding. But as that question is not in the case, it is unnecessary to consider it.

If I am right in supposing, that the offer does not impair the rights of the respondent to costs, the case is identical with that of *Putnam* agt. *Heath*, decided by this court, in September, 1870, and reported in 41 *How.*, 262.

The order of the special term awarding costs to the respondent, must be affirmed, with \$10 costs.

Colvert agt. Hall,

SUPREME COURT.

ALEXANDER COLVERT, respondent, agt. GEORGE HALL,
appellant.

Where judgment was rendered before the justice for the defendant for costs, and the plaintiff appealed to the county court and recovered judgment for \$60 and costs; and in his notice of appeal alleged that the judgment should have been in his favor and against the defendant, and there was no evidence to warrant the judgment: .

Held, that this specification of the particulars in which the judgment should have been more favorable to the appellant, did not call upon the defendant to make an offer to modify the judgment, as such specification indicated only a wish to have the judgment vacated, and another entered in his favor, which was not authorized by § 371 of the Code (*See Moran agt. McClearn, ante, p. 77*).

But the plaintiff, being the prevailing party in the county court, was entitled to costs.

Fourth Judicial Department.

Argued at Syracuse, November, 1871.

Decided at Buffalo, General Term, January, 1872.

Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.

By the court, MULLIN, P. J.—On the trial before the justice, the defendant recovered judgment for costs. The plaintiff appealed to the county court, and recovered judgment in that court for \$60 damages together with costs.

Both parties presented to the clerk bills of costs, for taxation and insertion in the record of judgment. The clerk taxed the bill of costs presented by the plaintiff, and the costs, as taxed for him, were inserted in the record. The defendant moved, at special term, to strike the costs, as allowed, from the record, and that costs be taxed in his favor

Colvert agt. Hall.

and inserted in said record. This motion was denied, and from the order denying said motion the defendant appeals.

By section 371 of the Code, the prevailing party in judgments rendered on appeal, is entitled to costs in all cases, unless the appellant shall be entitled to them pursuant to the provisions of that section.

The plaintiff, in his notice of appeal, alleges that the judgment should have been in his favor and against the defendant and there was no evidence to warrant the judgment. There is no other specification of the particulars in which the judgment should be more favorable to the appellant.

By reason of the want of such specification the defendant was not called on to make an offer to modify the judgment. If the allegation in the notice of appeal can be considered as indicating a wish to have the judgment of the justice altered it is to have that judgment altogether vacated and another entered in his favor. This cannot be done under section 371. The judgment can be modified upon complying with its provisions, but not reversed.

The case is not brought within the exceptions or limitations of section 371, and hence it follows, that the prevailing party is entitled to costs.

The order of the county court must be affirmed, with \$10 costs.

Wadley agt. Davis.

SUPREME COURT.

JOSHUA WADLEY and others, appellants, agt. JOSEPH DAVIS,
respondent.

The defendant, in his notice of appeal to the county court, alleged that the judgment of the justice for \$169 25 damages and \$8 05 costs against him, should have been more favorable to him in the following respects :

1. It should have been in his favor, and against the plaintiffs, for \$200.
2. It should have been in his favor, and against the plaintiffs, for damages and costs.
3. It should have been for a less sum, to wit, for only \$50 against appellant.
4. It should have been for a less sum, to wit, for only \$75.

On the trial before a referee in the county court, the plaintiffs recovered judgment for \$155 27 damages, or \$13 98 less than the recovery before the justice.

Held, that the plaintiffs were entitled to costs.

This court has decided at the present term, in the case of *Moran agt. McCleams* (*ante*, p. 77), and in *Colvert agt. Hall* (*ante*, p. 80), that a specification that the judgment should have been for the appellant instead of the respondent, was not admissible under section 371 of the Code.

This court has also decided, in *Putnam agt. Heath* (44 *How.*, 262), that a specification in the notice of appeal that the judgment should have been more favorable in two sums of different amounts, was not a compliance with that section.

Fourth Judicial Department.

Argued at Syracuse, November, 1871.

Decided at Buffalo General Term, January, 1872.

Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.

By the court, MULLIN, P. J.—The plaintiffs recovered judgment before the justice for \$169 25 damages and \$8 05 costs.

The defendant appealed to the county court and in his notice of appeal alleged that judgment should have been more favorable to him in the following respects:

- 1st. It should have been in his favor, and against the plaintiffs, for \$200.

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2d. It should have been in his favor, and against the plaintiffs, for damages and costs.

3d. It should have been for a less sum, to wit, for only \$50 against appellant.

4th. It should have been for a less sum, to wit, for only \$75.

We have held at the present term in the cases of *Moran* agt. *McClarns*, and in *Colvert* agt. *Hall*, that a specification that the judgment should have been for the appellant, instead of the respondent, was not admissible under section 371 of the Code; that section contemplated a modification only, not a reversal of the judgment.

We held, in *Putnam* agt. *Heath* (41 *How.*, 262), that a specification, in the notice of appeal, that the judgment should have been more favorable in two sums, of different amounts, was not a compliance with section 371; that the appellant was bound to state the precise sum to which the judgment should be reduced, and if he did not, the respondent was not bound to make an offer to modify it.

After the appeal to the county court, the issues were referred for trial to a referee, who ordered judgment in favor of the plaintiff, for \$155 27 damages, or \$13 98 less than the recovery before the justice.

The appellant has, in no respect, complied with the provisions of the Code in order to entitle himself to costs. The plaintiff having recovered is entitled to costs, unless the appellant has established his right thereto.

The special term having awarded costs to the appellant, and directed their insertion in the record, the order must be reversed with \$10 costs, and an order must be entered awarding costs to the plaintiff, and their insertion in the record.

Atkinson agt. Sewine.

N. Y. COMMON PLEAS.

ATKINSON agt. SEWINE.

An injunction order only affects property received, earned or due the judgment debtor *before* the making of the order.

Where the judgment debtor borrowed \$100, to pay his rent, after the injunction order in supplementary proceedings was made, but did not pay his rent until after it was served upon him:

Held, that he was not in contempt for disobeying the order.

Special Term, August, 1871.

MOTION to punish for contempt in disobeying an injunction in supplementary proceedings.

It seems, that after the order was granted, and just prior to the time when the same was served on the judgment debtor, he borrowed a check for \$100, for the purpose of paying his rent, which amounted to that sum, and which was then past due.

It also appeared that the maker of said check was not indebted to the judgment debtor in any sum whatever, but advanced or loaned the same to him, as an accommodation to enable him to pay his said rent.

After the defendant received the said check, and after the service of the injunction upon him, summary proceedings were commenced by the landlord to dispossess him and his family from the premises occupied by them, whereupon he paid his rent with the check in question.

R. H. CHANNING, *for plaintiff.*

W. C. CARPENTER, *for defendant.*

LOEW, J.—There seems to be considerable doubt whether

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an injunction granted in supplementary proceedings, binds property which has been received by the defendant between the granting of an injunction and its service upon the defendant.

In this case, the defendant received, after the injunction had been granted and before its service upon him, a check for one hundred dollars.

After the service of the injunction, he disposed of this check, and the plaintiff claims, that this was a violation of the injunction, for which the defendant can be punished, as the order bound everything which the defendant had in his possession at the time of its service.

In support of this view, is cited the case of *Sands agt. Roberts*, (8 Abb., 343), in which Judge HILTON, evidently takes the view, that the order affects property in the debtor's hands at the time of the service of the order. On the other hand, it is contended, that the order only affects property received, earned, or due before the making of the injunction order (*Campbell agt. Genet*, (2 Hilt., 290), and cases there cited. This being a general term decision of this court, must control as long as it remains unreversed, and must control my decision.

Motion denied, without costs.

In the matter of Hare.

UNITED STATES DISTRICT COURT.

In the matter of UTLEY HARE, a bankrupt.

Marshal in a case of involuntary bankruptcy allowed \$2 50-100 a day for services of a custodian in charge of the goods seized, although the register finds that he should have boxed and stored the goods, and that such custodianship was unnecessary; marshal's claim for a *further allowance* under section 47 rejected.

Southern District of New York, in Bankruptcy.

At chambers, 4 Warren street, in the city of New York, in said district, on this 8th day of March, A. D., 1872.

I, the undersigned, register in charge of the above entitled matter, do hereby certify, that upon the taxation of the marshal's costs therein, I was attended by Chas H. Wigbt, Esq., the assignee of said bankrupt and the said marshal, by his deputy, Oliver Fiske, Esq., who presented for taxation a bill of the items of his said costs and fees, which bill is hereto annexed. That I proceeded to take the testimony of James Turney and Oliver Fiske, which is hereto annexed. That after hearing the respective parties, I taxed and deducted from said bill the following items, to wit:

" Copying papers.....	\$1 00
" Advertising in <i>Commercial Advertiser</i>	4 50
" 24 days custody, from January 29 to February 22d,	
"at \$2 50.....	60 00
" Allowance to marshal".....	25 00
	\$90 50

That as to the said item of \$60, and the said item of \$25, the marshal excepted to said taxation, and requested that the point be certified to the district judge for decision.

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And I further certify, that the reasons for taxing said item of \$60 from said bill, are as follows :

It appears from the testimony, that the property in question was a quantity of hardware upon the second floor or first loft, of a building, the first floor, and the second and third lofts of which were used by other parties for mercantile purposes. That said goods were deemed sufficiently secure at night by locking the door of the room in which they were, the custodian keeping the key. If so secured in the night, it is not suggested that they would not be equally secure under the lock and key in the day time. The suggestion that business letters that might contain money, drafts or other valuables, are usually directed to the place of business, and might fall into the hands of unreliable persons in case the marshal's custodian was not there to receive them, is answered by the fact, that if the door of the room were locked the postman would scarcely deliver them to a person outside. Besides, it would be easy to arrange with the postman, for the same man comes to the building every day to deliver letters—to deliver such letters at the marshal's office, or elsewhere.

But I think, the marshal is bound to deal as economically with property that he seizes under a warrant as if the property were his own, by purchase or otherwise. It cannot, in such case, be pretended, that he would be at the expense of having one man spend his time in watching it for the space of a month or so. He would either lock up the room or box and store the goods.

And when it is considered, that the responsibility of the marshal for loss of such goods, is measured by what is called ordinary care, such care as prudent men ordinarily take of their own property, the suggestion of his liability in such a case is absurd (*See Browning agt. Hanford, 5 Hill., 588; Moore agt. Westervelt, 1 Bosw., 357; Jenner agt. Joliffe, 6 Johns., 9.*)

It may be suggested, that the marshal should be allowed

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upon this item, a sum equal to what it would have cost to have boxed and stored the goods.

In answer to this, it appears that about the 12th of February, the landlord of the premises in which the goods were, obtained possession by summary proceedings, and the marshal was then obliged to, and did box the goods and store them elsewhere. A bill amounting to \$169 33-100 for thus boxing, removing and storing, is presented to the assignee by McEntee & Co.

I took the testimony of Chas. McEntee, a member of said firm of McEntee & Co., and herewith hand the same to the court, with the bill and vouchers annexed; from which it appears, that McEntee & Co., did this work with the aid of the men of the deputy marshal, and that they paid said deputy \$30 for the aid so rendered by his men. If, therefore, the marshal were allowed anything for such expenses, it would be to pay a second time for the same services. Had the marshal in the first instance done this boxing, and removing it would have avoided all pretext of claim for custodianship, and put the estate to no more expense than it has now incurred therefor.

The fact that the attorney for the petitioning creditors at the time he handed the warrant to the marshal, expressed the opinion, that it would be necessary to put a man in charge, I don't deem material. He could at best bind but one of the creditors, and I don't think that the marshal can substitute the opinion of the attorney for his own. He must act upon his own official discretion in the execution of the warrant.

As to the item, "allowance to the marshal, \$25," I don't understand that it is claimed, that any extra or unusual services were rendered in the case, none are stated certainly. If this item is allowed, it must be under the provisions of section 47, which is in these words. "For cause shown and upon hearing thereon such further allowance may be made as the court in its discretion may determine." It is

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clear, that something beyond the ordinary duties which a marshal is called upon to discharge in all cases, is here contemplated. I cannot think, that the present case is brought within the purview of this provision.

As the taxation of the other two items were not excepted to, I need not state why they were rejected. Respectfully submitted, I. T. WILLIAMS, register.

BLATCHFORD, J.—I think it is proper to allow the item of \$60, and to disallow the item of \$25.

The clerk will certify this decision to the register; ISALAH T. WILLIAMS, Esq., March 8th, 1872.

Lindsay agt. Deafendorf.

SUPREME COURT.

ISAAC M. LINDSLAY, admin'r, agt. SOLOMON DEAFENDORF and
FREDERICK B. DEAFENDORF.

Where the *decision* of the court, filed in the action, directs judgment in favor of the defendants against the plaintiff, who sues as administrator, it allows the costs to be taxed, and charged upon, and collected *out of the estate* represented by the administrator; and, in the absence of a special order made for mismanagement, they cannot be collected out of the administrator personally.

Where the plaintiff allowed sixteen months to elapse after his summons and complaint were served upon one of the defendants before he caused the same to be served on the other defendant, thus rendering it necessary that two answers should be prepared, though they contained substantially the same defenses; for that reason, *each defendant* allowed the *costs* before notice of trial, and disbursements prior to issue being joined by service of the answer of the defendant last served.

Oswego Special Term, March, 1872.

THIS action was commenced to recover possession of a five hundred dollar bond, or the proceeds thereof.

The summons was served on the defendant, Solomon, April, 1870, who employed Whitney & Skinner as his attorneys, who appeared and answered for him. And on the 31st of August, 1871, the summons and complaint were served on defendant, Frederick B., who retained the law firm of Whitney & Skinner as his attorneys, and they served an answer for him, October, 1871.

The trial was had at the January circuit, and a judgment given for the defendants, dismissing plaintiff's complaint. The principal defense alleged, and upon which the defendants prevailed, was that the bond in question was the property of one Eldred, who was a purchaser for value, and that the defendants were merely his agents for its disposal. This defense and the others alleged were common and substantially

Lindsay agt. Defendant.

alike for both defendants. The principal charge of the case was in the hands of Judge Whitney, although Mr. Skinner appeared and attended upon a portion of the trial.

This motion is made to obtain an order allowing the *defendants two bills of costs* against the estate represented by the administrator.

C. WHITNEY, *for motion.*

J. C. CHURCHILL, *opposed.*

HARDIN, J.—The decision filed in this action directed judgment in favor of the defendants against the plaintiff. That allows the costs to be taxed, and charged upon, and collected out of the estate represented by the administrator, and, in the absence of a special order made for mismanagement, they cannot be collected out of the administrator personally (*Code*, § 317; *Dodge* agt. *Crandall*, 30 N. Y., 294; *Slocum* agt. *Barry*, 38 N. Y., 46; *Fish* agt. *Crane*, 9 Abb., N. S., 252; *House* agt. *Lloyd*, 9 Abb., N. S., 257).

Had the plaintiff recovered judgment in this action, he would have also, under section 304, been entitled to recover his costs, and therefore, in virtue of section 305, upon the recovery by the defendants, they are entitled to recover costs, and as before observed collect them out of the estate represented by the administrator. Such is the effect of section 305 in its application to their case, and the learned counsel for defendants is in error in supposing that section entitles the defendants to two bills of costs.

Before the amendment of section 306, by the legislature in 1851, it was in terms applicable to cases not provided for by sections 304 and 305, and gave the court discretion in equity cases, but the amendment of 1851 provide that "in all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have

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judgment in their favor, or any of them," and since this amendment, it has been repeatedly held, that in all actions "when there are several defendants, not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the costs must be awarded by the court before they may be taxed and entered (*Bank of Utica* agt. *Wolf*, 18 *How.*, 102; *Wicklow* agt. *Bell*, 18 *How.*, 397). The section now applies to all cases whether legal or equitable (29 *How.*, 89).

The general rule is doubtless not to allow but one bill of costs when several defendants appear by the same attorney, and put in separate answers, and in cases where different defendants appear by separate attorneys who are partners, as well as when an attorney appears for one defendant, and another defendant appears by an attorney who is the clerk in the office of the other attorney (16 *Barb.*, 593; 8 *Paige*, 621; 5 *How.*, 104; 6 *How.*, 9; 6 *Hill*, 267; 2 *Sandf.*, 670; 3 *Sandf.*, 730; 16 *How.*, 91; 20 *How.*, 511).

When the appearance is by different attorneys for separate defendants collusively, and for the purpose of increasing costs, the courts have uniformly refused to allow more than one bill, and it has been said that when attorneys occupy the same office, it is strong ground for presuming that such appearance was for the purpose of increasing costs (15 *Abb.*, 75; *op. by* INGRAHAM, 29 *How.*, 89).

But in cases where there is no evidence before the court to prove or circumstances to justify the presumption, that the appearance was for the purpose of increasing the costs, and double services have in fact been performed the practice has been to allow double bills or additional bills to the extent of the increased services performed necessarily or properly in the cause.

When the Revised Statutes were adopted, they contained a provision requiring the chancellor to revise his rule as periodically, so as to regulate as well as diminish the costs chargeable thereunder—in pursuance of such requirements he pro-

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vided by rule 130, adopted so as to take effect the same day the Revised Statutes went into effect, "that when the same solicitor appeared for two or more defendants or different solicitors who are partners appear for several defendants, and separate answers are put in or other proceedings had by or for the defendants separately, the taxing officers in the taxation of costs, either as between party and party or between solicitor and client, shall consider whether such separate answers or other separate proceedings were necessary or proper; and if in his opinion any part of the costs occasioned thereby, was unnecessarily or improperly incurred, the same shall be disallowed."

The chancellor states in his opinion in *Wendell* agt. *Lewis*, (8 *Paige*, 614, 622), that it was supposed to be the settled practice at the time of the adoption of that rule, of his and "all other courts not to allow separate bills to be made out, or duplicate charges to be taxed for services which were performed but once," and in that case, he allowed the solicitor a new retaining fee for the new defendants brought before the court "by an amendment" (2 *Hoffman*, Ch. R., 86) The case in the 6th *Hill*, 265, which is cited by the learned counsel opposing this motion, as anything for disallowing two bills of costs, states the general rule, and judge BRONSON in following the rule allowed a charge for two pleas, because the action was for tort, and they pleaded separately "there being two defendants entitled to costs, and only one attorney (*op.*, 266) In *Tenbroeck* agt. *Paige*, 6 *Hill*, 267), there were two attorneys for different defendants, and only such services as were separate and distinct, were allowed to be taxed.

In *Walker* agt. *Allen*, (16 *How.*, 91), the court allowed the attorney who appeared for two defendants, "in addition to his bill of costs his charges for putting in the separate answers of *Russell*," it having been necessary in that case to interpose a separate answer (*Same case*, 8 *Abb.*, 452).

In *Castellanos* agt. *Beauville*, (2 *Sand*, *supra*), it was held

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only one bill would be allowed when the defenses have been united, and for the period before the union of the management of the case, separate bills were allowed to the separate attorneys.

The plaintiff in this case allowed sixteen months to elapse after his summons and complaint were served upon one of the defendants before he caused the same to be served on the other defendant, thus rendering it necessary that two answers should be prepared, though they contained substantially the same defenses, and for that reason, each defendant should be allowed the costs before notice of trial and disbursements prior to issue being joined by service of answer of the defendant last served.

Order accordingly, without costs of the motion.

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SUPREME COURT.

CLINTON agt. MYERS.

Where a defendant has regularly noticed a cause for trial, but through mistake has omitted to file a note of issue with the clerk to have it put upon the calendar, the court on motion has the discretion, under the Code, to allow such note of issue to be filed with the clerk and the cause placed upon the calendar. But such motion will not be allowed to be made later than the *first* day of the circuit.

*Otsego, Special Term, March, 1872.**Before RANSOM BALCOM, J.*

THE defendant's attorney noticed this action for trial at the present term of this court, but through mistake omitted to furnish the clerk with a note of the issue as required by section 256 of the Code. The defendant's attorney now moves to have the cause entered upon the calendar according to the date of the issue. To which the plaintiff's attorney objects.

S. A. BOWEN, *for plaintiff.*L. L. BUNDY, *for defendant.*

BALCOM, J.—This cause has been regularly noticed for trial at this term of the court, by the defendant's attorney. But it is not on the calendar, for the reason that such attorney did not furnish the clerk with a note of the issue as required by section 256 of the Code. And no such note of issue has yet been furnished to the clerk. The question now presented is, whether the court may, in its discretion, allow the defendant's attorney to furnish the clerk with a proper note of issue, and have the cause entered on the calendar,

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according to the date of the issue. It is provided by section 174 of the Code, that the court may, in its discretion, "supply an omission in any proceeding;" and I am of the opinion, it is a proper exercise of discretion to allow the defendant's attorney to furnish the clerk with a proper note of the issue in the action, and have the cause entered on the calendar. Leave to do this is granted him.

It is proper to add, that this motion was brought up on the first day of the term, and that such a motion would not be entertained on a later day.

Comstock agt. Dodge.

COURT OF APPEALS.

DANIEL D. COMSTOCK, respondent, agt. JOHN DODGE, executor, &c., appellant.

Where in an action of *assault and battery*, for forcibly expelling the plaintiff from defendant's premises, it is a question for the jury to determine, from the evidence whether the defendant had *actual possession* of the premises, giving him the right of such expulsion, where the evidence was uncontradicted that the defendant's son with his family occupied the premises, but under an arrangement with the defendant that the latter was to keep possession of the farm and premises and provide all the materials and necessities for living, and pay his son a stated salary per year for his services on the place.

Where the jury, under the charge of the judge, are prohibited, from passing upon the question, an exception to such charge on that point is well taken.

Where the defendant in such action has died since the trial, and the cause of action not being one that survives, a new trial should not be ordered, for no trial of the issue can again lawfully take place. (MASON, *J. dissenting*.)

June Term, 1869.

APPEAL from a judgment of general term of the seventh district.

GEO. B. BRADLEY, *for appellant*.

Action, assault and battery. Tried at Steuben circuit. Verdict for plaintiff. Defendant's exception heard at general term, seventh district, in first instance. New trial denied and judgment ordered on verdict. Judgment perfected. The testator having appealed to this court, died. His executor submitted. No opinion written.

The evidence authorized the jury to find the facts as follows:

The defendant's testator owned a farm and dwelling house on it, situate in the town of Corning, county of Steuben, upon

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which he had resided upwards of forty years, preceding March, 1862.

In March, 1862, his son James went to living in the house on the farm, under an arrangement by which he was to work for and under the direction of the testator, at the price of \$150 per year for his services, the testator to keep a hired girl in the house, furnish everything, and board the son and his family there; the testator to keep the possession and entire control of the house and premises and board his hands there; in fact the son James was the mere servant of testator.

Under this arrangement the son James was living in the house at the time in question, the testator furnished the provisions and they belonged to him; all the personal property on the premises, including the furniture in the house (with slight exception) also belonging to him, and his son James merely lived there under his direction and as his servant.

In May, 1862, the plaintiff went on the premises to and into the house there without any license or authority and there spoke harshly to the testator, who thereupon requested the plaintiff to leave the premises and informed him that he (the testator) had the control of the premises. The plaintiff refused to go, and after repeating the request several times, the testator sought to remove him, and in so doing used no unnecessary or unreasonable force or violence. The force thus used constitutes the alleged assault and battery. The son James was present a portion of the time in question, and did not in any manner (so far as appears) object to the assertion and exercise by his father of the right to expel the plaintiff from the premises.

It seems that relations of the parties had not been pleasant.

The plaintiff recovered a verdict of \$287.

The questions arise upon the exception to the charge as made, and upon the exceptions to refusal to charge as requested, whereby the court held as matter of law, that the testator had no right to require the plaintiff to leave the premises, or to expel him therefrom under any circumstances,

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inasmuch as his son James resided there, although the latter was a mere servant of the testator; and the court refused to submit any question to the jury in that respect.

I. The first exception to the charge of the court was well taken.

The court by this charge held, that the fact that the testator's son James was rightfully residing in the house, gave him exclusive control of it, whatever may have been the arrangement with the testator under which he resided there; and that the testator had not the right to expel the plaintiff or to exercise control there, although such right was expressly reserved to him by the arrangement under which James was residing there; that James had the exclusive control and that the testator could act only by his authority.

1. It may be that the house was the domicile of the son James, so as to enable him to protect him against an intruder, yet the testator also had the right to remove a stranger from the house; the testator's right to control, and his possession which he reserved and had by the arrangement, gave him the authority to produce the removal of the plaintiff at the time in question.

2. The son James was residing there as the servant of the testator, and it was not necessary for the testator to act through James or by his direction or request, although it might have been, and was, the duty of James to act under the direction of the testator, his master, and in so doing would represent the latter; the authority of James was merely derivative not independent.

3. By the charge, the court repudiates entirely the arrangement that the testator should have the control and possession, and gives James the exclusive control, and makes him the superior of the testator, makes the master the servant, and the servant the master.

II. The court ought to have submitted to the jury the first, second and third propositions, as requested respectively, or some one of them.

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1. The evidence fairly authorized the jury to find that James McBurney, the son, was a mere hired servant of the testator, and that the latter had the control of the house and premises, and the right to direct the action of the servant in the house and on the premises.

That constitutes actual possession in the testator (*Haywood agt. Miller*, 3 Hill, 90, 92; *Putnam agt. Wise*, 1 Hill, 248).

2. The servant, James McBurney, had no possession; he was the mere instrument of the testator, who performed services through him. James McBurney by virtue of his own right, had no power to expel anyone from the premises, but by his relation as servant to the testator, authority to him was implied, and in exercising such power or in defense of the premises, he would be deemed acting for the testator, and as the instrument of the latter. It would be the act of the testator, and by virtue of his implied authority.

3. The right to expel a party from land by force, depends upon actual possession, and can only be justified by the party in possession (*Parsons agt. Brown*, 15 Barb., 590.)

The testator clearly had the possession, and by the refusal of the plaintiff to leave the premises, on his request, he became a trespasser from that time, and the testator and nobody else had the right to expel him (*Adams agt. Rivers*, 11 Barb., 397; *Wood agt. Leadbitter*, 13 Mee. & Welsb., 838).

4. The idea of the judge at the circuit, that the house was the domicile of the servant, is true to a certain extent; he had the right to protect himself in it, and by virtue of the authority from the testator implied by his relation as hired servant, he had authority to protect the premises; but in the exercise of the right he would be deemed acting for the testator.

5. The expulsion of a party in such case is upon the idea of protection of property and not of the person.

And certainly what a party may do by another, he may do himself.

6. If the servant were prosecuted for expulsion of a party

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from the premises of his master, he could not justify by any possession of his own, but as acting for his employer, and his relation would support his authority.

7. The action of trespass can only be maintained by the party in possession of occupied land (*Stuyvesant agt. Tompkins*, 9 *Johns.*, 61; *Frost agt. Duncan*, 19 *Barb.*, 560).

The servant, James McBurney, could not have enforced protection to the premises by action of trespass; the testator had possession, and he only could maintain such action. That is the test (*Putnam agt. Wise*, 1 *Hill*, 248; *Boggett agt. Frier*, 11 *East.*, 301; *Russell agt. Scott*, 9 *Cow.*, 281).

8. The servant, James, had no possession himself.—Ejectment would not lie against him (*Haywood agt. Miller*, 3 *Hill*, 92).

He had no independent right in respect to the premises. He could not assume any right in that respect as against the testator. The latter had the right to remove him from the premises (*Haywood agt. Miller*, 3 *Hill*, 92).

9. The servant, James, being the representative of the testator, the latter through him had the actual possession of the premises (*Putnam agt. Wise*, 1 *Hill*, 248).

And with it the right to protect them fully by physical force or by action.

He exercised his right in this case, and no more.

10. This is not a case of expulsion by force of a party in possession, by one having merely a right to the possession. The plaintiff was a stranger on the premises. Somebody had the right to require him to depart, and expel him.

The servant, James, may have had the authority as servant, but the defendant had the independent right.

11. It cannot be claimed that James had the right to expel the testator, that the servant could legally drive the master from his premises.

The entire services of James belonged to the testator, who was chargeable for injurious consequences to others by negligence of the servant while in his service.

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III. It appears, that James McBurney was present when the testator was removing the plaintiff from the premises, and made no dissent.

It is insisted that the jury were authorized to find that James consented to the expulsion.

In view of the holding of the court at the circuit, that the master and servant had changed positions, so that the servant had become the master, and that the testator could act in that respect only by his consent, the fourth proposition ought to have been submitted. Although the ruling of the court in this respect is not conceded to be tenable.

IV. The arrangement as stated by the testator, was effectual to continue the actual possession in him, and the servant, James living there pursuant to that arrangement, thereby relinquished to the testator all the rights in that respect (if any) which he otherwise may have had; and no authority of the servant can be set up against the affirmative action of the testator in relation to the premises.

The plaintiff was advised of the rights of the testator and has no reason to complain of the consequences.

The court ought to have submitted the question to the jury.

The judgment should be reversed, and new trial granted.

GEO. T. SPENCER, *for respondent.*

In March, 1862, James McBurney took possession of a house on the defendant's farm, in the town of Corning, under an agreement with the defendant to occupy the same, with his family for an indefinite period. In May, 1862, the plaintiff went to the house occupied by James McBurney, for the purpose of making a social call on his wife.

While there in conversation with Mrs. McBurney, the defendant came in and ordered the plaintiff to leave the house. The plaintiff refused to go unless Mrs. McBurney desired him to leave, she did not request him to leave.

The defendant thereupon seized the plaintiff by the collar,

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dragged him out of door, off the steps down upon the ground and bruised and severely injured him from which injury he became sick, sore and lame, and so continued for a long time.

This action was brought to recover for the injuries sustained by him.

The action was tried before Hon. J. C. SMITH, and a jury. The plaintiff recovered two hundred and eighty-seven dollars, upon which judgment was entered. The defendant moved for a new trial in the general term, in the seventh district, which motion was denied, and he then appealed to this court.

I. James McBurney, being in the actual possession of the house when this assault and battery was committed, had the right to invite his friends or the friends of his wife thereto and with the consent of either, any of their friends could visit them and was not trespassers in so doing.

They had the right to determine who might and who might not come to this house as well from their rights as persons in actual possession, as from the permission of the defendant. He testified, "I told my son and his wife they must be very careful who they let come there or they would get imposed upon."

The plaintiff was the guest of Mrs. McBurney, and the defendant had no more right to expel him from the house than he had to expel her. She had received him as her guest, and was conversing with him when the defendant came in.

The defendant was not living at this house, but was residing with his family about half a mile distant.

To authorize a party forcibly to expel a person from premises, he must be in the actual possession thereof; having the right to possession is not sufficient (*Parsons agt. Brown*, 15 Barb., 590; *Hyatt agt. Wood*, 13 J. R., 238).

II. The first exception taken by the counsel for the defendant is to the charge of the justice holding the court,

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wherein he charged the jury, "that if they were satisfied from the evidence, that at the time of the injury, James McBurney was rightfully residing with his family in the house which the plaintiff visited, then the house as a domicile was for the time being under the exclusive control of James McBurney, and if the plaintiff lawfully visited the house for the purpose of seeing a member of the family residing there, and conducting himself properly while there, the defendant had no right to expel or remove him from the house by force without authority of James McBurney."

This charge was correct (2 *Kent's Com.*, 431; *Parsons agt. Brown*, 15 *Barb.*, 590).

This house was clearly the dwelling of James McBurney. His family resided there.

Any and every settled habitation of a man and his family is his house or mansion (*Mason agt. the People*, 26 *N. Y.*, 200).

III. The court charged the jury that this was a case in which they might give exemplary damages if they thought proper.

To this charge an exception was taken.

This was a proper case for the allowance of exemplary damages (*Worth agt. Jenkins*, 14 *J. R.*, 352; *Tillotson*, agt. *Chectham*, 3 *J. R.*, 56; *Sedgwick on Damages*, 482).

IV. The request of the counsel for the defendant to charge the jury, was properly refused.

There was not evidence sufficient to authorize the jury to find that the defendant had actual possession of this house.

It is error to refuse to charge the jury as requested, if the evidence would not warrant them in finding the facts, even though as a proposition of law, the desired instructions are correct (*Kiernan agt. Rocheleau*, 6 *Bosw.*, 148).

V. The judge also properly refused to charge as requested.

It would have been improper for the court to submit the question, whether James McBurney was a mere servant or whether the defendant had actual possession of the house

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There was no proof to justify the jury in finding that James McBurney was only a servant, and if the jury had so found their verdict, it would have been set aside. The question whether James McBurney was rightfully in possession had been fairly submitted by the judge in the charge as given.

VI. The request of defendant's counsel was properly refused.

It makes no difference what acquirements the defendant made with James McBurney, he yielded the house to him as a domicil and removed with family therefrom to a house some distance off, and took up his domicil or residence.

He abandoned it as a domicil when he left. He could control but one house as a domicil.

The fair import and meaning of the contract between the defendant and James McBurney, is that James was to have the use of the house, furniture and wages of a hired girl, and \$150 for his services for one year.

This made James a tenant of the defendant, and so long as he performed his part of the contract, the defendant had no right to remove him, until the defendant had recovered possession, James had the right to control the house, and say who should and who should not visit him or his family there.

VII. The judge also properly overruled the request of defendant's counsel.

To authorize a party to eject a person by force from a house or from premises, he must have the actual possession, having the right to the premises is not sufficient (*Parson agt. Brown*, 15 Barb., 590; *Hyatt agt. Wood*, 3 J. R., 238).

And there was no evidence which would authorize the jury in finding that the expulsion was by the assent of James.

VIII. The judge properly overruled the request of the counsel for the defendant to charge as requested (*See authorities under last point*).

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There was no proof which would have authorized the jury to find the plaintiff was a trespasser; and if he was at the time, there was no proof that the defendant had the authority to expel him.

DANIELS, J.—The only evidence given upon the trial of this cause concerning the terms made, while James McBurney occupied the dwelling-house, from which the defendant forcibly expelled the plaintiff, was that which was given by the defendant himself; he stated those terms to be that he was to keep possession of the farm and house; to keep a hired girl there; and board his son and his family there, and pay him \$150 per year for his services; that he, the defendant, was to furnish every thing for the house; keep possession and board his hands there; that he was to have entire control of the premises, and his son to work for him under his direction. That the furniture, beds, bedding and materials for the table, and all the personal property on the premises, belonged to him; that he furnished all provisions and every thing for the house, and that his son staid there under the arrangement mentioned by him.

If this evidence was true—and it was for the jury to determine whether it was so or not—then it was clear that the defendant was in the possession of the house when he removed the plaintiff from it. For, as his son occupied it for him, and not for himself, as his servant and under his control and direction, that rendered the possession his own, and not that of his son (*Putnam agt. Wise*, 1 *Hill*, 234, 248; *Haywood agt. Miller*, 3 *Hill*, 90; *Robertson agt. George*, 7 *N. H.*, 306).

And after giving the plaintiff notice that this was the relation existing upon this subject between himself and his son, as the plaintiff testified he did, he had a right to require him to leave the house, and upon his refusing to do that unless directed to do it by his son's wife, whom he had gone there to visit, the defendant was justified in applying such a degree

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of force to him as was rendered necessary for the purpose of securing obedience to the direction he had given.

The learned judge at the trial, therefore, erred in declining to charge the jury that the defendant was justified in expelling the plaintiff from the house, if they should find the fact that he was at that time in possession, and that he used no more force than the occasion required after he had first requested him, and the plaintiff had refused, to leave the house. His request was afterwards twice again repeated, and to each repetition of it the court responded as before.

The charge, as given, did not include or answer it. For the jury could have very consistently found that the defendant's son was rightfully residing with his family in the house, while the actual possession was that of the defendant. Such, no doubt, was their relation, if what the defendant testified to was the truth; but the charge of the court totally deprived him of the legal benefit he was entitled to derive, by way of defense, from the possession he had of the dwelling-house. The point was clearly and distinctly raised, as well as fairly presented, by the evidence and the defendant was entitled to have the judgment of the jury upon it. As he was deprived of that right the judgment appealed from should be reversed, but as the defendant has departed this life since the trial was had, and the cause of action is not one that survived his decease, it should be done without directing a new trial, for no trial of the issue can again lawfully take place, and without costs to either party.

HUNT, LOTT, WOODRUFF and GROVER, JJ., concur.

MASON, J., dissents.

Elwell agt. Robbins.

SUPREME COURT.

JOHN F. ELWELL agt. WILLIAM R. ROBBINS.

On a reference to ascertain the rights of claimants to *surplus moneys* in a mortgage foreclosure case, the claimants are entitled to the *fees of the referee* and *fees of the clerk*, in the proceeding.

The only *costs*, aside from disbursements, that can be allowed the claimants, at the rate allowed for similar services in civil actions, are such as are prescribed by the Code.

In this case, the claimants are entitled to costs for two motion fees of \$10 each. One for the appointment of the referee, and the other for the confirmation of his report.

It seems, that there may be cases in which it would be proper to allow a *trial fee*, before the referee. These are special proceedings and costs may be allowed in the discretion of the court.

Otsego Special Term, March, 1872.

Present, RANSOM BALCOM, J.

THE mortgaged premises having been sold pursuant to a foreclosure judgment in the action, there was a surplus of over \$1,000, after paying the mortgage and costs in the action. On motion of William Burch, Esq., the court appointed B. J. Schofield, Esq., referee under rule 77 of this court, to ascertain and report as to the rights of persons to said surplus. On the presentation of the report of said referee, it was confirmed on motion of said Burch, who asked for costs of the proceedings.

WM. BURCH, *for claimants.*

BALCOM, J.—It was held in *The N. Y. Life Ins. and Trust Co.* agt. *Vanderbilt*, (12 Abb., 458), that in disposing of surplus funds arising on foreclosure of a mortgage, the court has authority to allow to the parties a suitable com-

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pensation for costs and disbursements, to be paid out of the funds, but nothing in addition to the taxable costs.

This is the special proceeding. It is provided by statute, that in special proceedings, costs may be allowed in the discretion of the court, and when allowed shall be at the rate allowed for similar services in civil actions (*Laws of 1854, p. 593, § 3*).

The claimants to the surplus money in this case, are entitled to the fees of the referee, \$3, for one day, and fees of the clerk in the proceeding. The only costs, aside from disbursements, that can be allowed the claimants, at the rate allowed for similar services in civil actions, are such as are prescribed by the Code.

The attorney for the claimants has made two motions in this proceeding, one for the appointment of the referee, and the other for the confirmation of his report. And by section 315 of the Code, not exceeding \$10, for each motion can be allowed the claimants or their attorney, in the discretion of the court.

I will not say but that there may be cases where the proceeding before the referee should be regarded in the nature of a trial, and a trial fee allowed to the claimant of the surplus money in the discretion of the court. But I think no trial fee should be allowed to the claimants in this proceeding.

The attorney of the claimants seems to think, that \$20 will cover his charges and the disbursements in this proceeding, and the costs and disbursements of the claimants therein, are fixed at \$20, to be paid to them or their attorney out of the surplus money in question.

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U. S. DISTRICT COURT.

In the matter of JOHN J. STAFF, and JOHN J. STAFF, Jr.,
bankrupts.

A bill of items of an attorney's claim is not made evidence of the statements therein contained, merely upon the testimony of the attorney that he performed the services mentioned in the bill, and that they are worth the sum therein charged. Creditors who object to the accounts of the assignee do not suffer any of the consequences of a default by a non-appearance before the register at the auditing of the account.

It is the duty of the register in auditing a bill for professional services and disbursements, to examine the items of the accounts as to the necessity and value of the services, and the occasion, necessity and amount of the disbursements and how they came to be rendered and made, and whether they are proper items for such an amount, or whether they ought to be compensated through some other form of proceeding.

Southern District of New York, in Bankruptcy.

At chambers, 4 Warren street, in the city of New York, in said district, this 29th day of March, A.D., 1872.

I, the undersigned register, in charge of the above entitled matter, do hereby certify that, pursuant to the directions of the district judge in this matter under my certificate therein of February 13th, I proceeded to the audit of the accounts of the assignee, which were duly filed with me on the 11th day of January, 1872. Whereupon the said assignee offered himself as a witness, and was examined by Mr. Whitehead, who stated that he appeared for Mr. Malcolm. At the close of his testimony the assignee stated, that this was all the testimony he had to offer. Mr. Whitehead, then called Mr. Malcolm, who being sworn, was examined by Mr. Whitehead. At the close of the testimony of Mr. Malcolm, Mr. Whitehead offered in evidence a bill of the items of the claim of Mr. Malcolm which was filed with me by the assignee, as one of

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the vouchers of his said account, on the 11th day of January aforesaid. But I declined to permit the paper to be read as evidence of the facts that might be therein stated. To this ruling Mr. Whitehead excepted, and desired me to certify the point to the district judge for decision.

And I further certify, that the grounds of the said decision, are as follows: I have examined the paper as a voucher, and was familiar with its contents. It is duly receipted and its validity as a voucher, *i.e.*, as proof that the assignee did in fact consent that Mr. Malcolm should retain out of the sum of \$1,339, which he claims to have collected, the sum of \$893 86-100, as and for his professional services in and about collecting the same, all this was before the court at the time the case was sent back to me with directions to "audit the account of the assignee, including the item for the amount allowed by him to Mr. Malcolm," which I construe to mean, to take testimony concerning the services claimed to have been rendered, and determine the value thereof (3 *Denio*, 391). I could not think this paper, *per se*, evidence of the truth of whatever might be written therein, nor could I think that it became so upon the evidence given by Mr. Malcolm, to wit: "I performed the professional services mentioned in Exhibit A." (the paper in question). "These professional charges and disbursements were made in and about collecting this very money." * * *

"I am acquainted with the value of professional services in the city of New York. In my opinion, the charges were very moderate. If the fund had been larger, I should have charged a larger sum." If such testimony would make a paper admissible as evidence of the truth of whatever might be written upon it, a witness when called upon the stand, has only to produce a paper upon which he has written what he wishes to prove, swear that what is therein written is true, and hand it up to be read as his testimony in the case. But as the paper is before the court as one of the vouchers of the assignee, we may look into it for the pur-

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pose of ascertaining what it would prove if admitted in evidence, for this will obviate the necessity of sending the case back to the register, in case the district judge should be of opinion that the register erred in refusing to receive the paper as evidence of the truth of its contents. The first item is as follows: "1869, February 9, To services in the proceedings to obtain injunction against bankrupts and against sheriff of the city and county of New York, to prevent sale of property in his hands under the execution, \$100 00." He tells us here in what matter he rendered services for which he charged the assignee \$100, but he does not tell us what services they were—what he did for which he charges this \$100. These words, if incorporated into his testimony would not throw the faintest light upon the matters now under inquiry. He says his services in a certain matter were worth \$100, but that anyone else may say what his services were worth in that matter he, must know what was done in it. Every other item of the bill is open to the same criticism.

The last item of the bill is as follows: "To five per cent. in collecting moneys from the bankrupt, \$66 69." This item is open to still broader criticism. If this item may not be proven by the paper offered, clearly the whole paper is inadmissible.

But what alone would be fatal to a large part of this claim, is the fact that it nowhere appears upon whose retainer the services were rendered. True, the bill is made out to "Charles H. Bailey, assignee of John J. Staff and John J. Staff, Jr.," and no doubt Mr. Malcolm must be understood to assert and maintain that he rendered all of the services, and made all the disbursements now claimed for, for and at the request of the assignee. But he has not sworn to that, and will not probably do so, as one third of the whole amount of them were rendered and disbursed before Mr. Bailey was elected assignee.

The first meeting of creditors was held, and Mr. Bailey

was elected assignee on the 3d day of November, 1869. His election was approved and he received his assignment on the 11th of the same month. The first item of this claim is \$100 for services rendered on the 9th day of February previous, the very day the petition in bankruptcy was filed. If from this we infer that Mr. Malcolm was acting for petitioning creditors, the record shows that it was a case of voluntary bankruptcy. And again, if from this we infer, that he was acting for the bankrupts, his bill as well as the record shows, that Mr. Byrne was the bankrupt's solicitor, and that Mr. Malcolm was acting adversely to them; but upon whose retainer, prior to the 11th of November, is left entirely to conjecture. But all the items of the bill of a later date, are open to criticism scarcely less unpleasant. All of the services seem to have been in the bankruptcy court and in the bankruptcy proceedings, and don't seem to have been in anywise unusual in character, assuming that everything was done by Mr. Malcolm which his bill would, in any view of it, indicate, I think, that \$250 over and above disbursements is as high a sum as I have ever certified, or as this court has ever allowed for similar services in bankruptcy. The disbursements charged subsequent to the 11th of November, (including a charge of \$19 85-100, as paid register, which, I presume, means commissioner), amount to the sum of \$29 30-100, which added to the said sum of \$250 amount to the sum of \$279 30-100. But, on the other hand, if the district judge shall be of opinion that the rejection of the bill, as evidence of the recitals therein contained, be correct, then, clearly, there is no evidence before me upon which an audit may be founded, and it will seem to be necessary to remit the case for further proceedings.

I did not cross-examine either the assignee or Mr. Malcolm, and no one appeared on the part of the creditors to do so. Nor did I call other witnesses as to the value of the professional services, or as to what services were, in fact, rendered. And in view of a return of the case for further proceedings

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by way of auditing the account, I crave the judgment of the court as to the duty of a register in regard to such cross-examination, and in regard to calling witnesses in case none appears on the part of the creditors.

Upon the question here presented, I beg to submit the following :

The duty enjoined upon the register is to audit, not simply to adjudicate. To hear and examine, not on one side only but on both sides. The duty is not only judicial but ministerial, administrative. I know of no statute or judicial writing in which the word "audit" is applied to the action of a court, *ex ri termini*, it implies executive as well as judicial action. If the act of auditing implied only judicial action no more would be required of the register than that he take such evidence as the assignee on the one hand and the creditors on the other, saw fit to submit, and pass upon the same, basing his decision upon such evidence alone. But an auditing officer proceeds to examine an account for the purpose of ascertaining in any way he may be able, without regard to established forms or technical rules, what sum ought in fairness be allowed. This is the course universally pursued by the auditing officers of corporations, civil or municipal, and it has grown into an established usage or custom. The word, as used in the act and general orders, is, no doubt, used in this accepted sense, as there is no other established sense in which it can be used. If this view of the case be correct, it is clear that the parties objecting to the item of Mr. Malcom's claim do not suffer a default, or any consequence of a default, by not appearing before the register at the hearing, and urging their objections, nor for this omission, on the part of the creditors, is the duty of the register in any degree lessened or mitigated, but rather increased.

But this view of the case places the register, in case of the non-appearance of the objecting creditors, in a position which the profession do not readily accept. They inquire,

"who objects?" "Is the court to object to the items of the account it is sitting to pass upon?" "Is the register to act as court and counsel?" What I desire is, that these questions should be authoritatively answered and settled by the district judge. Experience has shown, that creditors simply in their character as creditors will rarely, if ever, appear, or in anywise interfere in the administration of an estate which the court has taken under its bankruptcy jurisdiction. The reason for this is clearly discernible in the provisions of the act itself.

The English bankruptcy system, upon which our own is modelled, as well as the bankruptcy system of every other civilized country, is said to be "a system for the speedy distribution of the effects of the insolvent trader among his creditors." The court, as its first act, seizes upon the estate of the debtor, brings it within its jurisdiction and control, and thereby charges itself with the duty of a just, full and complete administration of such estate in the interest of all concerned.

Thus duties, executive in their character, devolved themselves upon the judges of bankruptcy courts. And it was not until the practical operations of the system had effectuated at least four legislative revisions of the law, that parliament accepted the fact that creditors, as such, would not (for it was then, as it is now, altogether impracticable), to so participate in the proceedings as to relieve the judge of the variant, and sometimes apparently conflicting, duties of a judicial and ministerial officer, that a new class of officers were called into being, who were especially charged with the administrative duties of the court. These officers were, as are the registers under our own act, deprived of the strict judicial function of deciding an issue duly framed, but upon them were devolved only those *quasi* judicial functions which our act calls "administrative duties."

Auditing the accounts of an assignee is clearly among those administrative acts, which pertain thus peculiarly to the

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register. But if the register has only to hear such testimony as may be offered on the part of the assignee on the one side, and by the creditors on the other, he ceases to be an administrative officer, and assumes purely judicial functions. And if the practice of the bar and the decisions of the court all tend in that direction, it is clear, that our bankruptcy system will soon be stript of all that distinguishes it favorably from the system of the collection of debts, which preceded it. That system required each creditor to go into court with his individual claim and prosecute that claim, in person or by attorney under the penalty of its total loss, in case he failed at all times so to appear to prosecute the same. The multiplicity of suits of this character and the immense labor and expense attendant upon them, in a country whose trade and commerce was so extensive as was that of England, led to the enactment in that country of bankruptcy laws as early as the year 1542. But in the interests of "state rights," we have been deprived in great part, of this powerful and effective aid to commerce until we are now compelled to accept of experiences, other than our own, to guide us in interpreting and administering our law. And if, under the influence of old habits, we permit the functions of these administrative officers to fall into disuse, we shall, instead of following the model we have adopted, which has been so useful in promoting the commercial interests of England, render our own act not only powerless for good, but so harmful to commerce, that its repeal will be demanded. Respectfully submitted, I. T. WILLIAMS, register.

BLATCHFORD, J.—In regard to the matters presented by the certificate of the register herein, of March 29th, 1872, the paper A, as referred to by Mr. Malcolm, may properly be regarded as evidence of what items of services Mr. Malcolm claims to have rendered, and what disbursements he claims to have made, and as evidence of the items of alleged services and disbursements for which the assignee claims to be

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allowed, in his accounts, the sum of \$893 86, as paid out by him to Mr. Malcolm. But the items, all of them, require to be explained, as to the occasion and necessity and value of the services, and the occasion and necessity and amounts of the disbursements, and how they came to be rendered and made, and whether they are, in any event proper items for this account of the assignee, or whether they ought to be compensated through some other form of proceeding. The paper and its items, without such explanations, amount to nothing, so far as testimony given may explain any item in the above respects, that item and such testimony may be received in evidence together, for whatever together they may properly indicate.

The register's views in regard to his duty in auditing an account, are correct.

The matter is remitted to the register for further proceedings.

The clerk will certify this decision to the register, Isaiah T. Williams, Esq., March 30th, 1872.

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BUFFALO SUPERIOR COURT.

JOSEPH M. WOLFORD, by his guardian, &c., agt. ANGELIQUE
L. OAKLEY.

Where an infant plaintiff procured the appointment of a *guardian*, and the suit proceeded to issue and was on the calendar for trial : On a motion by the defendant to dismiss the complaint and action, on the ground that the guardian was at the time of his appointment, and still is *an infant* :

Held, that the defendant, not knowing of the infancy of the guardian until after service of his answer, the irregularity in the appointment of guardian was not waived by him in answering upon the merits :

Held, also, that the plaintiff, having shown satisfactorily, that the guardian acted under a misapprehension as to his having attained his majority and having lately ascertained his mistake, was allowed upon terms to appoint a new and proper guardian to proceed in the action *nunc pro tunc*.

Special Term, March, 1872.

BEFORE the commencement of this action, the infant plaintiff procured the appointment of a guardian, and the suit proceeded to issue, and was upon the calendar of the present civil term for trial. A motion is now made by the defendant to dismiss the complaint and action, on the ground that the guardian was, at the time of his appointment and still is, an infant. The fact is not controverted, but the plaintiff satisfactorily shows that the guardian acted under a pardonable misapprehension as to his having attained his majority, and had only lately ascertained his mistake. The plaintiff asks that he be allowed to procure the appointment of a suitable guardian, *nunc pro tunc*, without prejudice to the proceeding already had.

P. G. PARKER, *for the motion.*

SPENCER CLINTON, *opposed.*

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SHELDON, J.—The omission to procure the appointment of a guardian for the infant plaintiff, was an irregularity, and not a jurisdictional question. This court has jurisdiction of the parties and of the subject of the action, and the irregularity established is such a one as may be cured or waived (*Fitch* agt. *Fitch*, 18 *Wend.*, 513; *Fellows* agt. *Niver*, 18 *Wend.*, 563; *Rutter* agt. *Puckhofer*, 9 *Bosw.*, 63S).

It is claimed, that in this case, the irregularity is waived by answering upon the merits, thereby admitting that the plaintiff is *rectus in curia*, and that if the defendant has any remedy now in the matter, it is not by motion. But the moving affidavits show, beyond any question, that the defendant had no knowledge or information of the infancy of the guardian until after the answer was served, and indeed, the guardian himself discloses by his affidavit that he believed in good faith that he had attained his majority and so acted publicly until sometime after the commencement of this action.

As a general principle, the subsequent steps of a party in an action, in ignorance of an irregularity, do not always operate as a waiver of the irregularity (3 *Caines*, 107). In this case, the position of guardian was assumed by an infant in full belief he was of age, as evidenced by his transacting business in his own name, and exercising the right of elective franchise, and it is not improbable that a motion by defendant made before answer, would have been met by the positive assertion, that the guardian was competent in that respect, and the motion failed. The motion was made without delay, upon ascertaining the evidence of the fact relied upon, and I think, that the court would not be justified in holding that the irregularity has been in any manner waived, but conclude that it still exists, and has not been cured by attempting to procure and procuring the appointment of a competent guardian.

The case of *Parks* agt. *Parks*, (reported in 19 *Abb.*, 161), was not a well considered decision, and undoubtedly was

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rendered without the benefit of the suggestion of Justice MONELL, delivered as the judgment of the court in *Rutter* agt. *Puckhofer*, above cited, and which was not then published. Were such the rule, to the extent claimed, then, after answer, the defendant would be remediless and deprived of the protection intended to be given him by statute, to indemnify him for costs in actions where the plaintiff did not recover, even though his answer was interposed in entire ignorance of the infancy or procured by false suggestions of the plaintiff, or those who were using him to accomplish their designs. Such a rule would be in conflict with the remedial provisions of the Code, and unfounded in principle.

The infant plaintiff must have a guardian appointed before he commences his action; he must appear by guardian and cannot appear in court otherwise, and the guardian is made responsible for the costs adjudged against the infant plaintiff. (*Sections 115 and 316 Code, and rule 61.*)

If he fails to do so, the defendant is not limited to his answer in the nature of a plea of abatement, but may move to have the proceedings set aside for irregularity.

The plaintiff asks to be allowed now, to procure the appointment of a competent guardian *nunc pro tunc*, and that the case proceed the same as if one had been appointed before the commencement of the action, and in asking this, has shown that the irregularity complained of was unintentional, and his proceedings have all been taken in good faith. It is the practice to allow a party opposing a motion to amend the defects, or cure the irregularities complained of, without a new motion on his part, where the amendment proposed is proper in itself, and the court can see from the nature of the case that no new facts can be presented that ought to defeat it (10 *Abb.*, 424; 8 *Abb.*, 33; 3 *Abb. N. S.*, 223). The latter case may be considered an extreme case, but it is consistent with the spirit of the sections of the Code, upon which it was founded.

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The plaintiff should have the opportunity of correcting his irregularity, and if the appointment is procured and accepted by the guardian in this stage of the case, he will be liable to the defendant for all costs of the action, if the defense succeeds.

The motion to set aside all the plaintiff's proceedings is granted with costs of suit, and ten dollars costs of this motion, unless the plaintiff procures the appointment of a guardian within fifteen days, and gives notice thereof to the defendant's attorney, and pays ten dollars costs of making this motion, the plaintiff's proceeding to be stayed meanwhile.

The order to be entered will also provide, that if such appointment is procured and the terms complied with, all process, pleadings and papers in the action be amended by substituting the name of such guardian in place of the guardian now purporting to be acting, and the issue heretofore joined be considered as proceeding from the date thereof, the same as if the said newly designated guardian had been originally appointed.

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SUPREME COURT.

LORANE NORTHRUP agt. MARY WHEELER, and others.

The wife of the grantee of mortgaged premises must be served with notice and made a party to the proceedings to foreclose the mortgage by advertisement under the statute, in order to cut off her inchoate right of dower.

Chenango Special Term, May, 1872.

ACTION to redeem mortgaged premises from a foreclosure by advertisement, by plaintiff, who was not served with notice; she being, at the time of such foreclosure, the wife of a grantee of a portion of the mortgaged premises, who has since died.

E. D. NORTHRUP, *for plaintiff.*LEWIS SEYMOUR, *for defendant.*

BOARDMAN, J.—The plaintiff's right to recover in this action is founded upon the conceded facts, that she, being the wife of Nelson W. Northrup, the owner in fee of a portion of the mortgaged premises, was not served with notice of foreclosure of the mortgage, and whereby her equity of redemption still exists; that, by the death of her husband, she is entitled to redeem said premises from the mortgage and possess her dower therein.

The only answer to such claim, is that it was not necessary to serve any notice on the wife; that service upon the husband was sufficient, and that the proceedings having been, in other respects, regular, the wife's equity of redemption is foreclosed and cut off.

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As the wife of Nelson W. Northrup, the plaintiff had an inchoate right of dower in the premises of which he was the owner, subject to the lien of the mortgage, given before his purchase, for purchase money.

If her right was not cut off by the foreclosure, she became, by the death of her husband, entitled to redeem the premises and to enjoy the dower therein.

I have examined, with much care, the authorities cited, and I have no doubt that her inchoate right of dower could not be extinguished without service of notice upon her, and making her a party to the foreclosure (*Wheeler agt. Morris, 2 Bosw., 524; Mills agt. Van Voorhis, 23 Barb., 125*, affirmed as to all the principles laid down, though a new trial was granted for special reasons in 20 N. Y., 412).

The defendants rely upon *Lathrop agt. Heacock*, (*MS. decision of the general term, fourth department, see abstract in 3d Albany Law Journal 213*), to show that it was not necessary to serve process on the wife when it was served on the husband. A *dictum* of Justice JOHNSON, in the opinion, would warrant such a conclusion; but in that case, there was an appearance by both husband and wife, although without authority from the wife. The court held that such appearance was binding upon the wife, and that the judgment could not be attacked for want of jurisdiction in any collateral proceeding. To the same effect *Foote agt. Lathrop*, in same matter, (*53 Barb., 183*), and *Brown agt. Patchin*, (*42 N. Y., 26*).

If the plaintiff had an interest which it was necessary to cut off, in order to bar her equity of redemption, she must have been served with process, or notice, or in some way made a party to the action. If the Revised Statutes, do not provide for making her a party to a foreclosure by advertisement, the mortgagee would have to resort to an action in equity to effect his purpose.

While I think the plaintiff might properly have been made a party to the foreclosure under the statutes, by service of

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notice on her, and that thereby her rights might have been cut off, it is not necessary to decide that point.

No attempt was made to foreclose her rights in the proceedings had, and consequently her rights, whatever they may be, remain unaffected by such proceedings.

If these conclusions are correct, the plaintiff is entitled to have an accounting to determine the amount due upon the mortgage in question, adding thereto the value of improvements made by the mortgagee, his widow and heirs, upon that portion of the mortgaged premises owned by said Nelson W. Northrup, and deducting therefrom the rents, issues, and profits received or enjoyed by them since they have been in possession of the mortgaged premises (*Wheeler agt. Morris, supra*, 4 *Kent's Com.*, *162, &c., 11th ed., 177; 2 *Crary Spec. Proc.*, 263, &c., and authorities cited).

The right of the plaintiff to be subrogated to the rights of the mortgagee is reserved until it shall be determined what, if anything, she is compelled to pay to redeem the part of the mortgaged premises of which her husband was seized.

The allowance of costs will also be determined upon the application for final judgment upon the report of the referee.

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SUPREME COURT.

FREEMAN MILLER agt. ELIZABETH C. MILLER.

In an action for *divorce* brought by the husband against the wife, for adultery, the defendant is entitled to an allowance as *counsel fees* to enable her to defend the action, where she interposes a defense of recriminatory charges of adultery against the plaintiff, including an act of adultery found against the plaintiff on a former trial, but which was shown to have been condoned by the wife.

And it is no valid objection to such allowance, that the parties to this action, on a former occasion, voluntarily, with the assent of their counsel, entered into an agreement for a separation from bed and board, and for a settlement of all suits between them; and that the husband in pursuance of that agreement transferred and delivered to the wife some \$2,000, in property which she agreed to receive and accept in lieu of dower, and of all right in his property and "in full for all future charges or liabilities for her support."

Jefferson Special Term, Watertown, March, 1872.

THIS was an action for a divorce brought by the plaintiff against the defendant his wife, upon the ground of adultery.

The defendant upon a petition and upon the pleading in this case, moved for the allowance as counsel fees, to enable her to defend the action.

The complaint charges the defendant with numerous acts of adultery committed with various persons during the years 1870 and 1871. The answer interposes three defenses.

1. A general denial, except as to the fact of marriage.
2. Recriminatory charges of adultery against the plaintiff.
3. That in a suit brought by the defendant against the plaintiff in the year 1866, for a divorce on the ground of adultery in which the plaintiff as a defense interposed recriminatory charges of adultery against her, issues were framed and tried by a jury.

That upon such trial the jury in a special verdict, found that the defendant herein was innocent of the acts of adultery

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charged against her, that the plaintiff herein was guilty of certain acts of adultery charged against him, but that the defendant had condoned the same by voluntary cohabitation with him of her knowledge thereof, and it is claimed that the plaintiff's adultery established by this verdict, though condoned, is available as a defense and is a bar to the action.

The plaintiff's counsel read various affidavits in opposition to the motion, tending to show, that for some time before the commencement of this suit, the defendant was engaged in keeping a house of prostitution. It also appeared, that a short time before the hearing of the motion, the defendant had been convicted in a criminal court, of keeping a bawdy house, but that in consequence of some error on the trial, the verdict was set aside and a new trial granted.

The plaintiff also showed, that in the year 1865, a suit was pending between him and the defendant in which the defendant asked for a temporary divorce, and an allowance from the plaintiff's property for her support, on the ground of cruel and inhuman treatment. That in March of that year, by advice of counsel on both sides, the suit was settled, and by consent a decree of separation was entered, in which an allowance for the support of the defendant was made from plaintiff's property, and that the parties have not lived together since.

Affidavits were also read on the part of the defendant, in reply to those of the plaintiff, by leave of the court, denying the acts of adultery charged against her, and also denying that she ever kept a house of ill-fame. It also appeared, that the cause had been referred to a referee to take the proofs in the case, and report the same to the court, with his opinion thereon.

D. O'BRIEN, *for motion.*

JAMES F. STARBUCK, *opposed.*

HARDIN, J.—It appears from the papers used on the

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hearing of this motion, that in March, 1865, the parties to this action voluntarily, with the assent of their counsel, entered into an agreement for a separation from bed and board, and for a settlement of all suits between them; and that the husband, in pursuance of that agreement, transferred and delivered to the wife, some two thousand dollars in property, which she agreed to receive and accept in lieu of dower and of all right in his property and "in full for all future charges or liability for her support." And it further appeared, that the decree entered by the parties, provided that said property received by the wife under such agreement as alimony should be received by her "in ratification cancelment and extinction of all liability of the husband to support or maintain the wife, or to furnish her with necessaries, or any other thing." And upon these facts the learned counsel for the plaintiff claims, that the motion should be denied.

Were this motion made wholly to obtain alimony, the authorities cited would justify a denial of the motion. The wife having accepted the provision made for her in lieu of all claims for support, should not be allowed to hold and enjoy that property, and then cast herself upon the husband for him to support and maintain (*Rose* agt. *Rose*, 11 *Paige*, 166; *McDonough* agt. *McDonough*, 26 *How.*, 193; *Bartlett* agt. *Bartlett*, 1 *Clark Ch. R.* new ed. 466).

The wife in this action is not entitled to alimony *pendente lite*, because she has not made restitution, or offered to, of the property she received from her husband in pursuance of the agreement of March 1, 1865.

Formerly it was almost a matter of course to grant counsel fees to enable the wife to present her defense in an action for a divorce. And her denial under oath in some cases was held sufficient to justify the court in making an order requiring payment of counsel fees and expenses for her defense. And it has been repeatedly held, that her guilt or innocence would not be passed upon on affidavits (*Wright* agt. *Wright*, 1 *Edwards Ch.*, 62-255, 317; *Williams* agt. *Williams*, 3

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Barb. Ch., 62S; *Wood* agt. *Wood*, 2 *Paige*, 108; *Osgood* agt. *Osgood*, 2 *Paige*, 621; *Hallock* agt. *Hallock*, 4 *How.*, 160; *Leslie* agt. *Leslie*, 6 *Abb. N. S.*, 193).

But it is insisted that the rule has been relaxed, and that this case comes within the modern rule (19 *How.*, 539; 43 *Barb.*, 515; 23 *How.*, 189; 26 *How.*, 194; 6 *Abb. N. S.*, 206).

If the only issue to be tried in this action related to the guilt or innocence of the defendant, the decision of the motion would be controlled by the opinion that might be entertained upon the questions involved in the numerous affidavits read on the motion.

But the answer of the defendant sets up the guilt of the plaintiff, which if established would be a good defense, however guilty she may be of the acts charged upon her. And the answer also sets up the adultery of the plaintiff which is alleged to have been condoned.

To try these issues, I think, the defendant is entitled to an allowance. By the papers in this case it seems that a very interesting question of law is to be presented in respect to the condoned adultery of the plaintiff, and one upon which there is considerable conflict in the authorities.

It is proper there should be a more full argument before a decision of it (*De Anguillar* agt. *De Anguillar*, 1 *Huggard, Eccl.*, 789; *Foster* agt. *Foster*, 1 *Comist*, 146; *Kirkwall* agt. *Kirkwall*, 2 *Comist*, 297; *Johnson* agt. *Johnson*, 14 *Wend.*, 637; *Wood* agt. *Wood*, 2 *Paige*, 115, and note; *Monell* agt. *Monell*, 1 *Barb.*, 318, *S. C.*, 3 *Barb.*, 236; *Whispell* agt. *Whispell*, 4 *Barb.*, 217; *Johnson* agt. *Johnson*, 1 *Edw. Ch.*, 439; *Johnson* agt. *Johnson*, 4 *Paige*, 460; *Burr* agt. *Burr*, 10 *Paige*, 20).

An order may be entered directing the plaintiff to pay fifty dollars (\$50), within thirty days (30) days, and upon the coming in of the referee's report on the evidence and the hearing of the motion to confirm the same, an application for a further sum may be made.

U. S. DISTRICT COURT.

In the matter of DAVID KEMPNER, a bankrupt.

A city marshal who levies an execution issued upon a judgment of a state court upon the property of the bankrupt, which levy is set aside as void by the bankrupt court as in violation of the bankruptcy act, has no lien upon the property levied upon, or the proceeds thereof, for the fees, poundage, &c., of such levy, and payment thereof, out of the fund in the hands of the assignee, denied.

It seems, that a judgment obtained before the filing of the bankrupt's petition, but with knowledge on the part of the judgment creditors that the debtor is insolvent, will be treated in bankruptcy as void under the act.

It seems, that a judgment creditor who has proved his claim (the judgment) in the bankruptcy proceedings so submits it to the jurisdiction of that court, that the judgment stands as a simple contract claim stripped of all the verity with which the judgment of the state court has clothed it.

Southern District of New York, in Bankruptcy.

A city marshal, who had levied an execution upon the property of the bankrupt five days before the filing of his petition, and held the same until ousted by the U. S. marshal under the warrant of the court in bankruptcy, petitions the court in bankruptcy to be paid the fees of such levy out of the bankrupt's estate in the hands of the assignee.

The petition being referred to the register in charge, he certifies thereon as follows :

I, the undersigned, register in charge of the above entitled matter, do hereby certify and report that, I have been attended by counsel for the petitioner, Samuel Schiele, in the annexed order referred to, and also by counsel for the assignee in this matter, and have taken the testimony of the respective parties which is hereto annexed, and have listened to their respective allegations and arguments, and I find that the judgment of Elias M. Sperling against the said bankrupt

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in said petition referred to, was rendered by default in the marine court of the city of New York, on the 20th day of March, 1871, for the sum of \$1,000 damages and \$10 costs, and that execution was on the same day issued to the said petitioner, who was then a city marshal of said city of New York, having full power under laws of the state of New York, to execute the same. That the said petitioner duly, and upon the 20th day of March, 1871, levied said execution upon the goods of the said bankrupt consisting of a stock of boots and shoes, then in the store of said bankrupt in College Place, in said city of New York. That said goods were in the sales-room on the third floor of the building, over which the said bankrupt resided with his family. That said room was the whole size of the store, to wit, forty-three feet by twenty-three feet, out of which was partitioned off a stairway leading to said floor above, where the family of said bankrupt resided. That the door to said room was duly secured by a lock which appears to have theretofore been regarded as a sufficient protection and security of said store of goods. That the said city marshal at the time of making said levy, placed two men in charge to watch said goods day and night, and kept them till the 4th day of April, 1871, on which day he proceeded, pursuant to notices in due form of law, to sell said goods at auction, but was, before the completion, of said sale staid by an injunction of this court in bankruptcy, and the United States marshal took possession of said goods under the warrant of this court in these proceedings, and placed one man in charge to watch and guard said goods.

That after the said 4th day of April, 1871, the same city marshal withdrew one of his said keepers, but continued one of them day and night till the 13th day of April, aforesaid, when said goods were surrendered to said U. S. marshal by the said city marshal, under an order of this court.

That on the 22d day of April, 1871, one of the judges of

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the said marine court, taxed the said costs, fees and disbursements of said petitioner at the sum of \$546 09-100, which sum the said petitioner claims as adjudicated to him by the said marine court. But in case this court should not deem such taxation binding upon it, and should look into the bill, said petitioner claims the sum of \$29 94 as levy and poundage fee; \$66 75, auctioneer's fees and disbursements; \$180 00, for the services of his said two keepers; and the further sum of \$30 for his own fee for the custody of said property during the period aforesaid; amounting in all to the sum \$306 09.

In reference to the taxation by the judge of the marine court, I think that, as it does not appear that such taxation was pursuant to notice, either to the bankrupt, his assignee, or any other person, this court is not bound to regard it as in any sense a judicial act. Again, the sum taxed (\$546 09) upon an execution for \$1,010, is calculated to provoke inquiry, and upon an examination of the law touching the fees of such officers, I feel that such a taxation might well meet with something more than an emphatic rejection.

As I understand the statute, the only sums that the city marshal could legally claim in any view of the case, would be, \$39 95, levy and poundage fee; \$66 75, auctioneer's fees and disbursements; and such sum as would be reasonable for the custodianship of the goods. No doubt, one man was sufficient, and I do not really think, that even that was necessary. The goods being few in number, and of a character that they could easily and without damage be packed into boxes and stowed away. And again, I think \$3 for a day and a night quite sufficient for a custodian, as he had only to sleep at night in the store when he could easily plan a bed and make himself as comfortable as he could be made elsewhere.

At \$3 a day and night, the sum disbursed would amount to but \$45, making in all the sum of \$141 70-100. But under the facts of this case, I don't see how it is possible

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that the petitioner should be entitled to anything whatever.

The petition against the bankrupt was filed the 25th of March, 1871. The judgment was recovered on the 20th March, only five days before. It is clear from the evidence, that the bankrupt was insolvent at the time, and that the judgment creditor had good reason to believe so. It cannot, I think, be doubted that had the judgment creditor bought in the goods in question upon the intended sale, the value of the goods might have been recovered back from him in an action by the assignee under the provisions of the act, on the ground that the judgment and proceedings under it gave the creditor a preference which rendered the judgment and all proceedings under it void. It is not easy to see how the city marshal could get a lien upon the goods under the levy of an execution issued upon a judgment so rendered void. If he got no lien, he has no ground here upon which he can base a claim against the proceeds of the sale of these goods; for it will not be claimed that there is any privity of contract between him and the bankrupt or the assignee.

It is, however, argued by the counsel for the petitioner, that notwithstanding the view above taken, the petitioner has, under the ruling of this court in the case of *Honseberger*, (2 B. R., 33), a lien on the property levied upon, for his fees. I don't so understand the doctrine of that case. There the attachment was legally issued, and good till set aside. Here the judgment and every step taken under it is void, as fraud upon the act.

The case of *Stubbs*, (4 B. R., 124) seems to me to be in point.

It was strenuously argued by the counsel for the petitioner, that it was not within the power of this court to declare the judgment of another court of competent jurisdiction void.

Of the correctness of the general principle here asserted, no doubt may be entertained. But to assert, that this court has not the power to treat a preference, even though in the form of a judgment obtained in violation of the provisions

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of the bankruptcy act, so far as the refusal to permit it, or any lien claimed under and in virtue of it, to be created under it, to be paid out of the proceeds of the bankruptcy estate, is to strike at the very foundation of the act. With the judgment so far as the court in which it was obtained is concerned, this court neither interferes, nor claims the right to interfere.

But the question, what rights shall the judgment creditor have under it, in the court of bankruptcy, is a question entirely for the bankruptcy court.

It appears also, that the judgment was proved by the judgment creditor in bankruptcy. This, under the provisions of the 21st section, is a voluntary surrender of his judgment to the jurisdiction of this court, who may thereupon treat it as a simple contract claim, stripped of all the verity with which the court in which it was recovered has clothed it. After that, it would be almost absurd to question the power of the bankruptcy court over it. Had the creditor refused to prove his judgment in bankruptcy, of course, bankruptcy would have had no effect upon it, or jurisdiction over it—save to discharge it.

The power of the bankruptcy court to discharge the judgment is not questioned. It is only its power to do a lesser thing—its power to refuse to recognize and pay an asserted lien of an officer charged with the duty of executing such judgment for his fees for so doing.

It seems to me, that so far as this court is concerned, the lien here claimed must show the facts of the judgment under which it is claimed to have been created. And as to that judgment, it having been obtained by a violation of the bankruptcy act the bankruptcy court will not recognize or pay it from the fund in the hands of the assignee.

I, therefore, recommend that an order be entered denying the said petition, with costs. Respectfully submitted, I. T. WILLIAMS, register.

The conclusions of the register having been acquiesced in by the petitioner, no opinion from the judge was required.

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N. Y. SUPERIOR COURT.

BENJAMIN F. STEPHENS agt. MANLEY HOWE and HENRY R.
STEVENS.

The act of congress of 1866, and amended in 1867, concerning the removal of causes from state courts, "at any time before the final hearing or trial of the suit," &c., is *unconstitutional*, and invalid as divesting the state courts of acquired jurisdiction in such cases, which by the judiciary act of congress of 1789, is made concurrent with the U. S. courts.

And there is no power conferred by the constitution of the U. S., upon the federal government, to divest a state court of its jurisdiction acquired in such cases.

Special Term.

THIS is a motion on the part of the defendant Howe, for an order directing, that this court proceed no further in the action.

TITUS B. ELDRIDGE, *for plaintiff.*

JOHN S. JENNESS, *for defendant.*

BARBOUR, *Ch. J.*—The papers show that the action was brought against the defendants as partners, on the 7th of February, 1867, to recover the sum of \$80,000; that the plaintiff then was and now is a citizen of New York, and both the defendants then resided and still reside in Massachusetts; that the defendant Stevens, has been released and discharged by the plaintiff, from all liability in this action; that the defendants appeared and answered in the action, the cause was tried before a referee and a judgment was entered upon his report in October, 1869; that the defendants thereupon appealed to the general term, and there obtained a reversal of the judgment and an order directing a new trial. After

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all that, and on the 15th of January, 1872, the defendant Howe, filed in the office of the clerk of the court an affidavit stating that he had reason to and did believe, that, "from prejudice or local influence he would not be able to obtain justice in this court," together with such a petition as is required by the act of congress, concerning the removal of causes from state courts, passed in 1866, and amended in 1867, (*See 14 U. S. Stat. at Large 306 & 558*), accompanied by a bond or undertaking in a penalty of \$500, &c., and thereupon filed with the clerk of the U. S. circuit court, the papers required by the said acts to be there filed upon the removal of causes; and the defendant's counsel now claims, that those acts on his part have, in fact and in law, operated and effected a removal and transfer of the action from the jurisdiction of this court to that of the said circuit court, under and by virtue of those acts.

Those statutes provide that "where a suit is now pending, or may hereafter be brought, in any state court, in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to, and does believe, that from prejudice or local influence, he will not be able to obtain justice in such state court, at any time before the final hearing or trial of the suit, and file a petition in such state court, offer security (and perform certain other formal acts,) the state court shall thereupon proceed no further in the action, but the same shall proceed in the U. S. circuit court."

As the defendant has complied, substantially with all the conditions of those acts, there can be no doubt this court has lost all legal right to proceed further in the cause, unless the statute is itself invalid, because unconstitutional. I am, therefore, compelled to determine that important question, in the first instance, upon this motion; and I do so the more readily, though with diffidence, for the reason that a decision

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here by a single judge, followed by a trial of the action in this court, may not only furnish the parties with the only means by which they can obtain the final judgment of the supreme court of the United States, upon the question, but, because the extent of the power of the federal government to destroy or interfere with the jurisdiction of the courts of the several states, in suits of this character, may thereby be ascertained and determined.

The federal government has no judicial nor legislative power, except that which is conferred upon it by the third article of the constitution (*Amend'ts to the U. S. Const Art. 10*). The second section of that article declares that, "the judicial power shall extend to controversies between citizens of different states;" and, so far as concerns the question now before the court, no judicial power is given to the government of the United States by the constitution, beyond what is contained in those words; nor has congress any legislative authority to increase such judicial powers. As Chief Justice MARSHALL well remarked, in *Hodgson agt. Powerbank* (5 *Cranch*, 303), "the statute cannot extend the jurisdiction of the U. S. courts beyond the limits of the constitution." Congress, therefore, can only pass such laws as are necessary for the purpose of carrying this provision of the constitution into effect.

The constitution, it will be seen, gives to every person who is, as between states, a foreign citizen, the personal right or privilege of having his controversy with a citizen of the state in which the litigation is had, tried and determined, at the option of such foreign citizen, in a court of United States; and that personal privilege is given to him for the sole and simple reason, that he is a citizen of a state other than that in which the suit is brought, while his opponent is a citizen of the latter.

No special legislation was, or has ever been, necessary in order to render that provision of the constitution effective, in so far as regards plaintiffs in action who were citizens of

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states other than that in which they brought their suits. For the constitution did not confer upon the U. S. courts the exclusive jurisdiction of suits between citizens of different states (*See Delafield agt. State of Illinois*, 26 Wend., 192; *S. C.*, 2 Hill, 161, and authorities there cited), and the judiciary act of 1789, declared, in express terms, that the jurisdiction of suits between citizens of different states was, concurrently, in the courts of both the state and federal governments. The plaintiff, therefore, had a perfect right to bring his suit either in the state or the federal court as he might see fit.

But in order to enable a defendant thus situated to avail himself of this constitutional right or privilege, some legislation was necessary; and, accordingly, congress provided, in the judiciary act of 1789, that "if a suit be commenced in any state court by one of its citizens against a citizen of another state, * * and the defendant shall, at the time of entering his appearance in such state court, file a petition therein for the removal of the cause for trial into the next circuit court of the United States, offer sufficient surety," (and do certain other things), * * "it shall be the duty of the state court to accept such surety and proceed no further in the cause, * * and the same shall then proceed in the U. S. court, in the same manner as if originally brought therein" (1 *U. S. Stat. at Large*, § 12).

For more than seventy years that statute of 1789, was universally conceded to contain all that was requisite or proper to carry the constitutional provision in this regard into effect, and it still remains unrepealed and in full force.

Under it, a defendant, upon entering his appearance in the state court for the mere purpose of transferring the cause to a court of the U. S., and without submitting himself to the jurisdiction of the former tribunal at all, is empowered, on performing certain formal acts, to remove the action into a federal court, if he elects to do so.

But the declaration in the act of 1789, that the jurisdic-

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tion of the state and federal courts is concurrent in suits of this character, not only directly authorizes a claimant to bring and maintain an action in a court of his own state against a citizen of another state, but necessarily, empowers the defendant therein to waive and relinquish the personal right or privilege of removing the cause, which the statute gives him, and to interpose his defense and submit to the jurisdiction of the state court.

In this case, the defendant voluntarily elected to and did, submit himself and the subject matter of the controversy to that one of the two courts of concurrent jurisdiction which, it must be assumed, he preferred, by putting in an answer, trying the cause, and obtaining a reversal of the judgment with an order for a new trial.

This court has therefore, by the acts of both parties as well as by and under the act of 1789, (even if that was essential,) become and is seized and possessed of as full, absolute, and exclusive a jurisdiction of the action, as any court ever has of a controversy before it.

The question, then, is not one touching the power of congress to enact such a statute as may be necessary or proper to carry into effect that provision of the constitution which gives a jurisdiction in these cases to the courts of the United States, but, whether the constitution confers upon the federal government the power to divest a state court of its jurisdiction, thus acquired and vested under a law of the U. S., as well as by virtue of the powers reserved to the state, and so exercised with the full consent, acquiescence, and participation of the parties themselves. It is sufficient to say, here that upon a careful examination of the U. S. constitution, I am unable to find such a power.

The fact that the defendant has filed an affidavit, stating that he believes he will not be able to obtain justice in the state court, (as is required by the acts of 1866-7,) is wholly unimportant. Whatever power congress has in such cases

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under the constitution, is founded solely, upon the fact, that the parties are citizens of different states.

I am, therefore, satisfied that, notwithstanding the statutes of 1866-7, and the acts of the defendant thereunder, the action is still in this court and that the plaintiff is entitled to proceed therein to a judgment; and it follows, that this motion must be denied, with costs.

Cockey agt. Hurd.

N. Y. SUPERIOR COURT.

ELIZABETH A. COCKEY, *et al.*, agt. FREDERICK A. HURD.

Section 401 of the Code does not authorize an application for a reference to take the deposition of a party to the action under that section.

Special Term, May, 1872.

THIS is an application on the part of the defendant to set aside an order of reference granted herein to take defendant's affidavit, under section 401 of the Code of Procedure.

CHARLES C. BIGELOW, *for motion.*

CURTIS, *J.*—The Code provides that, "where any party intends to make, or appeal, a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person."

It is urged by the defendant, that the words, any person, in the 7th subd. of § 401, do not embrace the parties, or either of them, to a suit, and that it was not intended to apply to them. Section 389 of the Code is cited as expressly limiting the examination of a party, except as prescribed in chapter 6th of the Code. The plaintiffs claim, that the 7th subd. of § 401, was added by the legislature in 1862, and has the effect of removing the restriction if any, in section 389, and that it was the intention of the legislature to remove all barriers in the way of taking the depositions of parties as well as witnesses, thus giving effect to the prevailing public sentiment in favor of removing every restriction.

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I think, if the legislature had intended, that the affidavits of parties might be taken in this manner, they would have clearly expressed it, and so far modified the restriction in section 389, that it would not apply. While the right to examine an adverse party in respect to the issues in an action is given, it seems rather to be the intention of the legislature, and was justly, that it should be confined to that, and not extended to motions arising in the progress of a cause. As a matter of public policy, it might be a serious question, how far a party should be subjected to be examined upon every motion that might be made in a cause, for the purpose of procuring his deposition or affidavit.

The views expressed by the learned judge in *Hodgkin agt. Atlan. Pacif. R.R. Co.*, (5 Abb. N. S. 73), appear to present the true interpretation of the section, and in accordance with the decision in that case, the motion of the defendant herein to vacate the order of reference granted to take the defendant's affidavit, should be granted, but without costs to either party.

Moore agt. Pillsbury.

SUPREME COURT.

ADDISON S. MOORE agt. AMOS PILLSBURY.

Where in an action for false imprisonment, the defendant admits the imprisonment, but denies that it was unlawful, and as a second defense sets up matter in justification, to which latter defense the plaintiff *demurs* on the ground that the facts stated do not constitute a defense, and the plaintiff then moves to *change the place of trial* for the convenience of witnesses:

Held, that as the demurrer is to the merits of the action, a decision upon it in favor of the defendant would end the case, and the examination of witnesses would be unnecessary. Motion denied, as premature.

Saratoga Special Term, March, 1872.

THIS action is false imprisonment. The defendant by his defense admits the imprisonment, but denies that it was without authority, or unlawful. In his second defense, the defendant sets up matter in justification. To the latter defense, the plaintiff demurred, on the ground that the facts stated did not constitute a defense to the action. The demurrer is not to the form of the pleading, but goes to the merits.

A motion is now made on the part of the plaintiff to change the place of trial from the county of Albany to the county of Saratoga for the convenience of witnesses.

J. W. EIGHTMY, *for plaintiff.*

N. C. MOAK, *for defendant.*

BOCKES, *J.*—The issue of law raised by the demurrer must first be determined, the court not having otherwise directed (*Code, sec. 251*), and it determined in favor of the defendant, judgment must be for the latter on the entire re-

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cord. In that event, the decision will be, that the imprisonment of the plaintiff by the defendant, was lawful, and the justification of the latter will be complete. In this condition of the case, it is insisted on the part of the defendant, that the motion to change the place of trial for the convenience of witnesses, is premature; that it cannot now be known, or insisted with certainty, that witnesses in the case will be necessary, or indeed, that any trial requiring the examination of witnesses will ever take place. I am of the opinion, that the objection is well taken. The decision on the issue of law, if in favor of the defendant ends the case, without the examination of any witnesses, certainly, until the issues be reformed, and whether this will be desired by the party, or permitted by the court, cannot now be known.

As the case now stands, it cannot be asserted, except hypothetically, that any witnesses will be needed in the case, and consequently it cannot be adjudged, that the attendance of any witnesses will ever be required.

The motion must be denied, with ten dollars costs, but with liberty to the plaintiff to renew it after the issue of law shall have been disposed of.

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SUPREME COURT.

THE TOWN OF MIDDLETOWN agt. THE RONDONT AND OSWEGO RAILROAD COMPANY, *et al*

A motion to dissolve an injunction, may be made before answer put in.

A county judge has no power or jurisdiction, on granting an injunction *ex parte*, to grant an order to show cause, returnable before himself, why such injunction should not be continued.

A county judge cannot hear a contested motion as to an injunction; because it requires the motion on notice to vacate shall be made before the court; and to show cause why the injunction should not be continued, being equivalent to a notice of motion for that purpose, he has no jurisdiction.

Where a county judge grants an *ad interim* order of injunction, with an order to show cause returnable before him on a certain day, why such injunction should not be continued, by a non appearance of the parties before him to show cause on the day specified, the injunction ceases, and there is none to be vacated.

The business which corporations were created to carry on, is not to be suspended, nor are their directors to be restrained from the discharge of their different duties, except by the court and upon notice.

Albany Special Term, February, 1872.

MOTIONS to vacate an injunction.

SAMUEL HAND and AUGUSTUS SCHOONMAKER, Jr., for
all the defendants, except Green & Satterlee.

EDWARD T. BARTLETT, for defendants Green & Satterlee,
in support of the motion.

T. R. WESTBROOK and F. C. CANTINE, for plaintiff, op-
posed.

LEARNED, J.—This action is brought in behalf of the plaintiff and all other stockholders, against the railroad company, its directors, and Messrs. Green & Satterlee. The complaint alleges, that the plaintiff prosecutes "by the direction of" certain persons who are commissioners of the plaintiff,

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under what is called a bonding act. It alleges, that the railroad company have entered into a certain contract for construction with defendants Green & Satterlee, and it asks that this contract be annulled, and that both a temporary and a final injunction be granted against carrying it into execution.

The grounds which appear to be alleged for this relief, are four: first, that the contract is exorbitant; second, that it is in violation of an agreement between the railroad company and plaintiff; third, that it contains a lease of the road for ten years, and fourth, that Green & Satterlee are pecuniarily unable to perform their agreement.

The complaint is verified in the usual form, by three persons who state, that they are commissioners of the plaintiff. It has attached to it also, a verification in the usual form, by a person not a party to the action, and also an affidavit by one of the attorneys as to the truth of facts relative to the aforesaid agreement.

The allegations in the complaint as to all the terms and conditions of the contract are on information and belief; those as to the pecuniary ability of Green & Satterlee, are on information only.

Upon these papers an injunction was granted on the 5th of February, 1872, by the county judge of Ulster county, the place of trial, enjoining the defendants from executing or consummating a lease or sale of the railroad, its property or franchises, or any part thereof, or any interest therein to Green & Satterlee, or to any other person and concluding as follows, "until the further order of the court in the premises, and you are hereby further required to show cause before me at my office in the village of Rondout, on the 14th day February, 1872, at 10 o'clock, a.m., why this order should not be continued."

On the 14th day of February, neither plaintiff nor defendants appeared (*i. e.*, in the legal sense) before the county judge, and no further order was then or has since been made by him in the matter. The defendants Green & Satterlee,

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by their attorneys appearing specially for this motion, and the other defendants, by their attorneys appearing in like manner, now move to vacate the injunction, and for other relief on the original papers, and also on affidavits served, and the plaintiffs read other affidavits in reply.

The grounds of these motions are several, and it will be necessary to examine them in detail.

Preliminarily however, the plaintiffs objects, that such a motion cannot be made before answer. This was a general but not an inflexible rule under the old practice (*Mallett agt. Weybossett Bank*, 1 Barb., 217).

But the language of section 225 which authorizes the defendant to make the motion "with or without the answer," has, I think, established a different rule.

The plaintiff urges, that this section means only that in making the motion the defendant may, or may not use the answer which he has served. But if he may make the motion without using his answer, what need is there of his waiting until his answer has been put in? Under the present practice, injunctions are to be granted and dissolved upon affidavits and it is only as an affidavit that the answer is used on a motion to dissolve. This subject is so fully and clearly discussed by Judge WOODRUFF, in *Fowler agt. Burns*, (7 Bosw., 637), that I need only refer to that case. I do not think, that the preliminary objection can prevail.

The defendants urge, that the injunction order is irregular, if not void, in that it requires the defendants to show cause before the county judge. It is to be observed at the outset, that an order to show cause is only equivalent to a short notice of motion (*Code*, § 402, *Parmenter agt. Roth*, 9 Abb. N. S., 393). The party obtaining the order is the moving party on the hearing (*New York & Harlem R.R. agt. Mayor*, 1 Hilt., 563; *Thompson agt. Erie R.R.*, 9 Abb., N. S., 238).

The hearing, therefore, ordered to be had before the county judge, on the 14th of February, was the hearing of a motion on notice.

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What is called an injunction is expressly an order (*Section 218*). It is also within the general definition (*Section 400*). An application for an order is a motion (§ 401). A county judge has no jurisdiction to hear and decide a contested motion. His power extends only to such orders as are made out of court and without notice (*Parmenter agt. Roth*, 9 *Abb. N. S.*, 385; *Rogers agt. McElhone*, 20 *How.*, 441). It is said, on the part of the plaintiff, that these decisions do not apply to the granting of injunction orders. The statement of the doctrine however by the court of appeals is not restricted.

The power of the county judge, they say, is limited to a class of orders which may be made without notice, and to which the applicant exhibits a right so plain that the judge is willing to grant the order without notice. But when the case is not so clear, the judge may require notice or grant an order to show cause. The application then becomes a special motion, and it can only be heard and decided by a judge of the court in which the action is pending (*See Parmenter agt. Roth*, 9. *Abb. N. S.*, 393.)

In the case of injunction orders, a power to grant them is given by section 218, to the court, a judge thereof, or a county judge. This is substantially the same provision as to injunction orders which is made general in section 401, subd. 3. Section 223 provides, that if the court or judge deem it proper that the defendant should be previously heard, an order may be made to show cause.

But this order to show cause is to be returnable at a "specified time and place;" not necessarily before the same judge. It must be at a time and place, when and where a contested motion can be heard; and of course, before some one competent to hear it. This section, therefore, does not settle the question who is competent to hear a contested motion. In section 225, it is said, "if the injunction be granted by the court, or a county judge without notice, the defendant, at any time before trial, may apply upon notice to a judge

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of the court," &c. The plaintiff argues, that this (substantially included in section 324), implies that a county judge may grant an injunction with notice. But I do not think, that this is the true meaning. By section 218, the power to grant injunction orders is given to three authorities; the court, a judge of the court, or a county judge. If the order should be granted by the court, even without notice, it would hardly seem right that a judge should be authorized to vacate it. An order made by the court should, of course, be vacated only by the court. Section 225, therefore, limits the cases where a motion to vacate may be made, before a judge of the court, to those in which the order was granted by a judge of the court, or a county judge. And as a judge of the court may grant the order with notice, it was necessary to limit the cases in which a motion to vacate might be made to those in which the order was originally made without notice. But the remainder of the section, by clear implication, shows that the county judge cannot hear a contested motion as to an injunction. Because it requires that the motion on notice to vacate shall be made before the judge of the court. If then a county judge cannot hear a motion on notice to vacate an injunction order, why should he be allowed to hear a motion on notice to continue such an order? Each motion brings up the merits similarly on a hearing of both sides.*

* Is there any provision in the Code, prohibiting a county judge from granting an injunction *on notice*? Or from hearing the facts on both sides, before granting it. An answer to these questions, affirmatively or negatively, would seem to settle the question of his jurisdiction accordingly, to hear contested motions on injunctions.

The power to grant injunctions is given, by section 218 of the Code, to the court, a judge thereof, or a county judge. Here is the power given in express terms.

By section 223 it is provided that if the court, or judge, deem it proper that the defendant should be previously heard, an order may be made to show cause, returnable at a specified time and place, &c. Is there any implication that this order to show cause may not be made by a county judge? Not any. Is there any implication that the order cannot be made returnable before the county judge? Not any, but the contrary.

If, as is supposed, this order to show cause, being equivalent to a short notice of motion, deprives the county judge of jurisdiction to hear the matter on the return

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It appears to me, therefore, that the decision in *Parmenter agt. Roth*, applies to injunction orders. It follows from this, that the county judge had no jurisdiction to hear the motion which he required the defendants to oppose before him on the 14th of February.

If they had appeared and opposed as they were required to do, and he had, on that day, upon such hearing, made an order continuing the injunction, such order would have been void for want of jurisdiction. And, in like manner, if the defendants had failed to appear, and the plaintiffs on proof of notice and on the defendants' default, had taken an order continuing the injunction, that also would have been void.

The question then arises, is the order granted by the county judge restraining the defendants still in force. The language of this order restrained the defendants until the further order of the court, and at the same time required them to show cause why the order should not be continued. Supposing for the present, that a county judge has authority to hear a contested motion, then if the plaintiffs had failed to appear on the return day, the defendants could not have brought on or opposed the motion for a continuance of the order. They might have had costs for plaintiff's failure to bring on the motion, but they would have had no power to bring on the motion themselves. The motion was to be made by the plaintiffs for a continuance of the injunction order; and they

day, it deprives him of the power to *grant the injunction*, given by section 218. For, be it remembered, we are still on the subject of the power of a county judge to *grant* an injunction.

Again, section 225 provides, that "if the injunction be granted by the court or a county judge *without notice*, the defendant, at any time before trial, may apply upon notice to a judge of the court," &c. Here is a plain recognition of the power of the county judge to grant an injunction, with or without notice.

If after this array of statute authority giving county judges jurisdiction to grant injunctions upon notice, the provisions of the Code that an order to show cause is only equivalent to a short notice of motion (§ 402); that an injunction is expressly called an order (§ 218); it being also within the general definition (§ 400); an application for an order is a motion (§ 401); and a county judge has no jurisdiction to hear and decide a contested motion; should be held to override the statute on injunctions, it would appear on the part of the legislature as little less than trifling with the jurisdiction of a judicial officer.—*R.R.*

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only could bring it on. If, therefore, the proper construction of an order, such as that of February 5th, is that the injunction is to continue until it is vacated, then the plaintiffs, by neglecting to bring on the motion to continue the order, can make the injunction permanent. That part of the order requiring the defendants to show cause becomes meaningless. By such an order the plaintiff gives a short notice of motion to continue an injunction. Is it reasonable to construe the order to mean, that if the plaintiff fails to bring on and obtain a continuance of the injunction, still the injunction is continued by the plaintiff's neglect. If this be the construction, it would be best for the plaintiff never to appear on the return day. And again if the injunction continues without any further action of the plaintiff, why should he give notice of a motion to continue it? This very notice of motion implies that, unless then continued by order of the court, the injunction will cease to be in force. It seems to me, therefore, that the further order of the court mentioned in the order, has reference primarily to an order to be made on the return day, and that the order granted on the 5th of February, was in its real effect, like an order under section 223 providing for an *ad interim* restraint until the defendants could be heard. This is a case in which the judge might, with great propriety, deem it proper that the defendants should be heard before granting the injunction, and yet might restrain them meantime as is provided in that section. The importance of the case, the magnitude of the interests involved, and the difficulty of the questions arising would naturally make any judicial officer wish to hear both sides before granting an order which might be very injurious. An injunction order should not be strained beyond the necessity of the case. If the proper object could be accomplished by an *ad interim* restraint until the hearing of both sides, this is the safer and wiser construction. I am aware, that in *Kelly agt. Jeroleman* (7 *Robt.*, 158), the superior court at special term denied a motion by the plaintiff to continue an

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injunction, holding that the order continued itself. The objection was not taken by the counsel on the hearing. And it is to be observed that, in that case, the judge practically, by his decision, refused to hear the defendants' objections to the injunction. He held in effect, that no such motion could be made; that the injunction was permanent, and that the defendant could be relieved only on a motion to vacate.

I think, that this decision cannot now be followed. For rule 94 has provided especially for such a motion as that which was then before the court; and that rule does not mean that the judge shall do nothing on the return day. On the return of an order to show cause why an injunction should not be continued in force, if both parties appeared and the judicial officer had jurisdiction, he would not now refuse to hear the views of both, and to decide accordingly; continuing the injunction or refusing to continue it, as he saw good cause.

There is another consideration which tends to show, that the order granted on the 5th of February, must be construed as an *ad interim* order only. The object of rule 94 was plainly to restrict the practice of granting permanent orders of injunction *ex parte*. It intends, therefore, to provide that an *ex parte* injunction order shall be, for the most for ten days, and that, within that time, the plaintiff shall make good his right to a continuance of the injunction, after giving the defendant an opportunity to oppose. If the construction claimed by the plaintiff is to stand, then rule 94 is utterly valueless. For the plaintiff has only to neglect to appear on the return day, and by that neglect his injunction remains permanent.

Or he may appear and refuse to bring on the motion to continue, and then the same result is accomplished. Such was the course of the plaintiffs in this case. They did not appear (legally) on the return day, and their non-appearance was, (as they claim), as effective as the most powerful argument in their behalf could have been. I am aware of the

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difficulties which may arise in harmonizing section 218 and section 401, subd. 4 of the Code, rule 46, paragraph 2, and rule 94 and the decision in *Parmenter agt. Roth*; but it is not necessary to consider those difficulties here.

For these reasons, I am of the opinion that the order granted by the county judge on the 5th of February was only an *ad interim* order and that, as the injunction was not continued on the 14th, it has ceased; and that there is now no injunction to be vacated.

With these views, it is unnecessary for me to examine the merits of the motion.

But perhaps one further point should be considered. The defendants urge that the injunction order was void under section 224 of the Code, and chap. 171, laws of 1870. By these provisions an injunction to suspend the general and ordinary business of a corporation can be granted only by the court and on eight days notice. Now, these provisions are not a limitation as to the grounds upon which a party may be entitled to an injunction; but only as to the tribunal which shall grant it, and the notice on which it shall be had. They assume, that sometimes an injunction may properly be granted to suspend the general and ordinary business of a corporation; but require that it be granted by the court.

In examining what is meant by an injunction to suspend the general and ordinary business of a corporation, some points are to be observed. The statute of limitation as to the power to grant injunctions may apply. 1. Although the injunction does not contain the words "general and ordinary business." 2. Although it suspends only a part of such business. 3. Although the corporation is acting illegally in respect to the general and ordinary business which is sought to be restrained. 4. Although the corporation has the power to carry on such business in some manner otherwise than that which is sought to be restrained.

In the present case, the complaint sets forth, that a contract has been made by the company with two of the de-

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defendants for the construction of the road, and that this contract includes a leasing of the road to those contractors; and the complaint asks an injunction against carrying this contract into effect.

The injunction order which was granted, does not, in terms, confine itself to restraining the carrying that contract into effect; but it forbids the leasing or selling any part of the property of the company to any person. It goes far beyond any matters alleged to have taken place, or even to be threatened.

There are no allegations on which to base such a sweeping restriction. The company could not sell a worn-out rail without violating the injunction; if the language is to be construed literally. And the injunction, in its literal construction, seems to me, in effect, to suspend the general and ordinary business of the corporation.

The injunction ought to have been confined in words to the contract set forth in the complaint. But even giving it that construction, it is then a restraint on the corporation from carrying out a certain contract for the construction of their road. Is not the building and equipping of a road a part of the general and ordinary business of the railroad company? Whether or not they can lawfully do this by the means which they propose to adopt, I do not inquire. Perhaps they can build it in some other way better and more profitably. But the building of the road is their ordinary business; and to do that ordinary business, they make the contract which is enjoined. I do not say that it is legal or not. Nor do I say whether or not they should be enjoined from the means by which, according to the complaint, they are undertaking to build their road. Even assuming that the injunction is one which the proper authority ought to grant; still, as I think, it suspends part of the general and ordinary business of the company.

The legislature, owing to events which are well known, has thought best to protect corporations, as to their general

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and ordinary business, from injunctions granted *ex parte* and out of court. The same act, in like manner, limits the power of granting an injunction to restrain any director from the performance of his duties as such.

And this present injunction comes within that limitation also. It cannot be said, that because this injunction restrained the directors from an alleged violation of duty, therefore, the act does not apply. For all injunctions, in such cases, are to restrain supposed violations of duty. And no such absurdity was intended as that a county judge, *ex parte*, might prohibit violations of duty in a director, but only a court on notice could prohibit a director from doing his duties properly. Nor do I think, that it can reasonably be said, that this provision refers to a complete prohibition of a director from performing any of his duties.

Otherwise, by an *ex parte* injunction out of court, a director could be prohibited from performing all his important duties leaving him free to discharge some that were unimportant.

Thus, the evil against which this legislative act was aimed, might be revived.

All who remember the history of railroad litigation within the few years past, will acknowledge the wisdom of the legislature in protecting corporations and their officers from *ex parte* interference by injunctions. And in using the language, "general and ordinary business," it appears to me, that they intended to make this protection broad. Thus, the business which corporations were created to carry on, is not to be suspended, nor are their directors to be restrained from the discharge of their official duties, except by the court and upon notice.

It is, therefore, proper that the injunction order although it has expired, should be set aside as contrary to these provisions, with costs to the defendants.

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SUPREME COURT.

THE TRUSTEES OF THE VILLAGE OF CANAJOHARIE agt. EDMUNDS BUEL.

An action cannot be sustained by the *trustees of a village* against an individual upon a *resolution*, though called an ordinance passed by them, imposing a penalty on the defendant of \$25, for a failure to remove an awning over the sidewalk, in front of his store, where, within the meaning of the village charter, ordinances must be *general* and not special only, imposing a penalty on a single individual.

Third Judicial Department, Albany General Term, March, 1872.

Before MILLER, P. J., POTTER and BALCOM, JJ.

APPEAL by plaintiffs from a judgment of the Montgomery county court, reversing the judgment of a justice of the peace.

H. DUNKEL, *for plaintiffs.*

D. S. MORRELL, *for defendant.*

By the court, BALCOM, J.—The resolution of the trustees of the village of Canajoharie, on which this action was brought, recited that complaint had been made to the board of trustees, "that the awning of Edmunds Buel, situated over and across the sidewalk in front of the store in Church street, now occupied by him, is a nuisance. Therefore, resolved and ordained that the said Edmunds Buel be and he is hereby required to remove said awning out of said street, within forty-eight hours after serving a copy of this ordinance on him, under a penalty of twenty-five dollars, hereby

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imposed on him for failure or neglect to comply with this ordinance."

This is not such an ordinance as the trustees of the village of Canajoharie were authorized to make. It was a mere resolution, though called an ordinance, imposing a penalty, in the nature of a fine on the defendant, of \$25, for a failure or neglect to remove his awning within forty-eight hours after service of a copy of the resolution on him. Calling the resolution an ordinance did not make it an ordinance. Ordinances, within the meaning of the plaintiffs' charter, must be general and not special only, imposing a penalty on a single individual.

The awning was not shown to be a nuisance, or to be an obstruction in Church street, or on the sidewalk. It was over the sidewalk ; and at the most, was only an encroachment on the sidewalk or street.

As there was no general ordinance respecting awnings, the remedy of the plaintiffs for the encroachment on Church street, by the defendant's awning, was under the statutes respecting encroachments.

The judgment of the justice was correct, and the county court erred in reversing it.

It follows, that the judgment of the county court should be reversed, and that of the justice affirmed, with costs. So decided.

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N. Y. SUPERIOR COURT.

MORRIS RAPHELSKY agt. JAMES LYNCH, sheriff.

A. motion for a new trial on the ground of newly discovered evidence, may be made and granted *after judgment final* entered in the action. Such a motion will be granted, where it appears from the papers used on the motion that the newly discovered evidence is material to the issue; that it goes to the merits of the action; that it is not cumulative; that it overthrows the plaintiff's claim upon which he recovered, and shows the suit to be a conspiracy, conceived in fraud and maintained by perjury. And that the evidence was not discovered until after the trial.

*General Term, December, 1871.**Before BARBOUR, Ch. J., McCUNN and JONES, JJ.*

A. J. VANDERPOEL, for defendant appellant.

THE defendant, on or about the 7th day of February, 1864, seized fifty cases of leaf tobacco, under and by virtue of several writs of attachment duly issued out of the supreme court against the property of William Salamon.

At the time the said property was so seized, it was on storage with G. Merle's Son & Co., No. 291 Water street, and they had given their receipt, dated December 22, 1863, stating that said fifty cases was received on storage by them "from Mr. James Parker, and subject to the production of this receipt."

The receipt at the time of the trial bore these indorsements: "James Parker to J. Cooper," "John Cooper," "Philip Franklin;" and the plaintiff claims to have purchased the tobacco from Franklin and received the receipt from him.

James Parker, the first indorser, was sworn as a witness in plaintiff's behalf on the trial, and testified that he

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"never owned the tobacco; it belonged to William Salamon. John Cooper was his clerk." "I was acting for Salamon" "Mr. Salamon told me to take the tobacco to Merle & Sons." "I don't know what the tobacco sold for; Cooper sold it."

John Cooper, the second indorser, did not testify on the trial.

Philip Franklin, the third indorser, testified that he purchased the tobacco from Cooper and sold it to the plaintiff, and transferred the warehouse receipt to him by indorsing and delivering it. A bill of the tobacco from Franklin to the plaintiff, dated January 4, 1864, was produced, and Franklin testified that the plaintiff paid for it at the time of the purchase.

On his cross-examination he testified that Cooper first came to him about the tobacco on Saturday, January 2, and he told Cooper he would find out on Monday, whether he could find a customer for it or not. That he saw the plaintiff the same day about it, and before he purchased it from Cooper, the plaintiff had agreed to take the tobacco. That he gave Cooper a \$2,000 due bill to be redeemed the next day, and received from the plaintiff three checks on the Park Bank—one for \$500, one for \$800, and one for \$2,000—and that he redeemed his due bill, held by Cooper, with the \$2,000 check.

The plaintiff was sworn, and testified that he purchased the tobacco from Franklin, January 4, and paid for it in three checks dated that day, on the Park Bank, for \$2,000, \$800, and \$500, and the balance in cash; that he had not that amount of cash in the bank at the time, and wanted some little time to make it up, and told Franklin he must not present the checks immediately. He further testifies that he received the warehouse receipt at the same time indorsed by Franklin; that he did not then know Salamon, Parker or Cooper, and did not know that Salamon, or anyone else, but Franklin was the owner of the tobacco or warehouse receipt. He also testifies that he had, perhaps \$1,000 in money in the Park Bank, and \$20,000 of 7.30s deposited there, but

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that he could not draw against the 7.30s without making some arrangement with the cashier.

Theodore P. Cornwell, from the Park Bank, testified that on the 6th of January, 1863, the plaintiff had \$936 50 to his credit in the bank, and about the same amount on the 4th; that there was no deposit of money or check until January 16th, when plaintiff made a deposit of \$5,000; that his check for \$500 was paid, January 19, to P. Franklin or order; the check for \$800 was paid January 20, to P. Franklin or order; and the check for \$2,000 was paid February 5, 1864, to P. Franklin or bearer. He also testified that the credit for \$20,000 in 7.30s bonds entered in plaintiff's bank book under date of September 30, 1863, was in the handwriting of the collection and discount clerk of the bank.

The defendant, by his own witnesses, and by the cross-examination of the witnesses for the plaintiff, showed on the trial, that in 1863, the debtor, William Salamon, was a wholesale and retail dealer in tobacco and segars in Philadelphia; that he closed up his business there in a summary manner the latter part of December, 1863, and absconded; that he came to New York, and from New York went to St. Catharine's, Canada, before January 1, 1864, in order to escape from his creditors; that he was indebted in a large amount, and had purchased merchandise during the month of December, for which he had not paid.

That Parker and Mrs. Salamon went to St. Catharine's and joined William Salamon in January, 1864, and that Cooper was there also.

The manipulation of the goods before they were stored with Merle & Co. also showed a fraudulent intent to keep from creditors.

The plaintiff sought protection under the statute making warehouse receipts negotiable, and claimed to be an innocent *bona fide* purchaser of the property before the seizure by the defendant. The defendant had no evidence to produce on the trial to show that the alleged transfer to the plaintiff did

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not occur on the 4th of January, as testified to by him and by Franklin.

A verdict was rendered in plaintiff's favor, and judgment was rendered thereon against the defendant on the 20th day of October, 1870.

In January, 1871, the defendant ascertained the testimony of Franklin and of the plaintiff, given on the trial, was false; that there was never any sale of the tobacco to the plaintiff, and that the alleged sale was concocted, and the bill of sale made out, and the warehouse receipt indorsed to the plaintiff after the defendant had attached the property, and that he could establish these facts by Annie Salamon, James Parker and John Cooper.

The defendant accordingly obtained from Annie Salamon her affidavit, setting forth that she was the wife of William Salamon, and came to New York from Philadelphia on the 26th of December, 1863; that soon after her arrival James Parker delivered to her the warehouse receipt mentioned; that, in addition to the fifty cases of leaf tobacco mentioned in that receipt, there was plug tobacco and segars in New York, belonging to her husband; that she was introduced to Franklin, and at his request she hired a store in his name in Brooklyn, and placed the plug tobacco and segars there for sale in his name on January 1, 1864; that she also delivered to him the said warehouse receipt for safekeeping, and afterwards at his request, procured James Parker to indorse it; that Franklin started for Canada, to see her husband, on the evening of January 6, she giving him \$10 towards defraying his expenses; that after Franklin left for Canada, she called on Mrs. Franklin, and inquired about the receipt, and Mrs. Franklin took it from the drawer and showed it to her and told her it was all right; that before Franklin returned to New York, and on January 10, she and James Parker started for Canada, where they found her husband at St. Catharine's, and she returned to New York, about the middle of January, and was then informed by Franklin, that the tobacco had

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been attached by the defendant, but that he (Franklin) still had the warehouse receipt; that one Wm. L. Flaherty, came from Canada to aid her in looking after the property, and that Flaherty and Franklin arranged to commence a suit against defendant for said property in the name of this plaintiff, and plaintiff agreed to pay Flaherty \$1,200 out of the sum recovered.

Defendant also obtained the affidavit of James Parker, corroborating Annie Salamon, and stating that he indorsed the receipt January 6th, at the request of Franklin and Mrs. Salamon; that there was no other indorsement on it at the time, and that he saw it in Mrs. Franklin's possession after Franklin had left for Canada, on the occasion testified to by Annie Salamon.

Defendant also obtained the affidavit of John Cooper to the same effect, and setting forth that there was no sale, or pretended sale, of the leaf tobacco until after Mrs. Salamon and Franklin returned from Canada, and after it was attached; "then in order to have everything *bona fide*, Franklin had a bill of sale of the said tobacco from William Salamon to deponent made out, and induced deponent to sign a note for the amount, or about the amount of the bill; that said Franklin also, at the same time, made out a bill of sale of said tobacco from deponent to him (Franklin);" that both of said bills of tobacco were dated back some ten or twelve days to bring the transaction prior to the issue of the attachments, and, after the said papers were completed, Parker indorsed the warehouse receipt at the request of Franklin; on that same day, Franklin told Parker that he would procure a person to claim the tobacco, as it was better his (Franklin's) name should not appear.

Upon these three affidavits, and defendant's own affidavit, setting forth, among other things, that all of said facts had been discovered by him since the trial, and that it was impossible for him to have ascertained the facts before said trial, and other papers set forth in the printed case, the defendant

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gave notice of motion for a new trial, upon the ground of newly discovered evidence, which motion was adjourned from time to time to April 27, 1870.

Pending this motion, the attorneys for the defendant obtained an order to show cause why the judgment should not be opened, so far as to allow defendant to make the said motion for a new trial; and upon the return of said order, after hearing the parties, the court (SPENCER, J.,) gave defendant leave to make such motion for a new trial, and opened and set aside said judgment so far as to enable defendant to make it. The motion for a new trial came on to be heard before MONELL, J., on the 25th day of April, 1870, and was denied. From the order denying said motion the defendant appealed to the General Term. The reasons given by Mr. Justice MONELL, for his decision are set forth at fols. 222 to 238 of the case.

The order opening the judgment was overlooked by Mr. Justice MONELL, at the time he decided the motion, and upon his attention being afterwards called to that order, he stated that he had overlooked it, but the papers were in manuscript, and he said he did not want the trouble of going over them again, and would let the order denying the motion stand, *pro forma*, and the defendant could bring the matter up in the general term.

I. The practice adopted by the defendant in applying to have the judgment opened, and for leave to make the motion for a new trial, was authorized by and was in accordance with the decision of this court in the case of *Stilwell* agt. *Staples*, (4 Robt. 639).

A court possesses an inherent power over its own judgments, and can, where justice requires it, vacate a judgment in order to relieve a party from technical difficulty (WOODRUFF, J., in *Court of Appeals*; *Folger* agt. *Fitzhugh*, 41 N. Y., 230).

II. Even if the judgment had not been opened by previous order, the court should have heard and decided the motion upon the merits (*Folger* agt. *Fitzhugh*, 41 N. Y., 228;

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Tucker agt. *White*, 27 *How.*, 97; *Tucker* agt. *White*, 28 *How.*, 78, where all the decisions on the subject to that date are cited and commented upon; *Blydenburgh* agt. *Johnson*, 9 *Abb.*, N. S., 459).

The decisions that a motion for a new trial cannot be made after judgment, are based upon the technicalities of the old practice, and are not in harmony with the spirit of modern jurisprudence. There is no reason in such a rule, and that it would sometimes work great injustice the case at bar fully illustrates. It would practically prevent a granting of new trials on the ground of newly discovered evidence. In case of surprise upon the trial, a defendant is prepared, at the close of the case, to make his motion, but how can a defendant move for a new trial when he is ignorant of the facts which justify it or render it necessary? Newly discovered evidence to be available for such a motion, must have been discovered after the trial.

III. Upon the merits the defendant is clearly entitled to a new trial.

1. The newly discovered evidence is material to the issue—it goes to the merits of the case, and is not cumulative. It overthrows completely the plaintiff's claim that he was an innocent and *bona fide* purchaser, or any purchaser of the property in question, and shows this suit to be conspiracy, conceived in fraud and maintained by perjury.

2. The evidence was not discovered until after the trial. Defendant was not able to discover it before. He used great diligence in obtaining testimony for the trial, and is not guilty of laches (*Oakley* agt. *Sears*, 1 *Robt.*, 73; *Adams* agt. *Bush*, 2 *Abb.*, N. S., 104, 110; *Quinn* agt. *Lloyd*, 1 *Sweeney*, 253; *Jackson* agt. *Laird*, 8 *Johns.*, 489).

IV. The court should exercise its power and grant a new trial, because justice requires it.

The newly discovered evidence, as set forth, shows this suit to be conspiracy, on the part of the plaintiff and his principle witnesses, to use this court to rob the defendant,

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and those whom he represents, of the property in question, by fraud and perjury.

When the court becomes aware that such a conspiracy exists, and is about to succeed, it should reach forth its strong arm, if necessary, to prevent consummation of the wrong.

V. The order appealed from should be reversed, and a new trial granted.

J. S. WOODWARD, *for plaintiff respondent.*

The trial of this action was commenced before *Mr. Justice FITHIAN* and a jury, on the 15th June, 1869, and the verdict was rendered on 16th June, 1869.

That final judgment upon the verdict was entered and perfected 20th October, 1869, plaintiff's proceedings having been stayed by various orders made on the application, *ex parte*, of the appellant from time to time, extending the time to make and serve a case and exceptions.

That on 21st October, 1869, notice of the entry of the judgment was duly served on the attorneys of the appellant.

That no appeal has been taken from the judgment.

That execution was issued upon the judgment 16th December, 1869, the issue of it at an earlier period having been delayed at the request of the attorneys for the appellant.

That the notice of motion for new trial was served on 14th January, 1870.

The court below, at special term, *Mr. Justice MONELL*, denied the motion, holding it was made too late, after judgment absolute had been entered.

From this order the (defendant) appellant appeals to the general term.

I. Motions for a new trial upon a case and exceptions, or upon the ground of surprise, or newly discovered evidence, must be made before, and cannot be made after, judgment absolute has been entered (*Supreme court: Jackson agt. Fussit, 21 How.,*

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279, CLERKE, J., 280; S. C., 33 Barb., 645; Peck agt. Hiller, 30 Barb., 655; Skelden agt. Stryker, 42 Barb., 254, 287-8; S. C., 27 How., 387; Jackson agt. Chase, 15 Johns., 354; Superior court: Anthony agt. Smith, 4 Bosw., 503; Barnes agt. Roberts, 5 Bosw., 73, 78, 80; Magnus agt. Tritchett, 2 Abb., N. S., 175; Gurney agt. Smithson, 7 Bosw., 400; Anderson agt. Dickie, 26 How., 199; S. C., 17 Abb., 83; Stilwell agt. Staples, 4 Robt., 639).

The court below was, therefore, right in denying the motion, and that order should be affirmed by this court.

II. The defendant (appellant) has been guilty of great and inexcusable negligence in obtaining his testimony claimed to be newly discovered (*Graham & Waterman on New Trials*, vol. 4, pp. 462, 472, 483-4; and vol. 3, pp. 1026 and '7; *The People* agt. Myers, 10 How., 261; *Leavy* agt. Roberts, 8 Abb., 310; *The People ex rel. Oelricks* agt. Superior Court, &c., 10 Wend., 285, 289, 291).

Such motions are granted with reluctance (3 *Graham & W.*, 1083-4-5).

The evidence must have been discovered since the trial (*Oakley* agt. Sears, 7 Robt., 112; *Dodge* agt. N. Y. & Washington S. S. Co., 37 How., 524; S. C., 6 Abb., N. S., 451; *Adams* agt. Bush, 2 Abb., N. S., 104; *Meyer* agt. Fiegel, 38 How., 424; *Quinn* agt. Lloyd, 1 Sweeny, 253).

III. The newly discovered evidence is wholly immaterial and cumulative.

The newly discovered evidence must be material and not cumulative (*Barrett* ag. Third Ave. R.R. Co., 1 Sweeny, 568).

IV. Newly discovered evidence which goes merely to impeach the credit of witnesses examined on the trial, is no ground for a new trial. It is not material within the rule (*Beach* agt. Tooker, 10 How., 297; *Meakin* agt. Anderson, 11 Barb., 216; *Powell* agt. Jones, 42 Barb., 24).

V. A new trial will not be granted where such evidence merely goes to disprove what was sworn to on the former trial,

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nor where it is to a fact controverted on the former trial, nor where it is merely cumulative (*Fleming* agt. *Hollenbeck*, 7 *Barb.*, 276; *The People* agt. *The Superior Court, &c.*, 10 *Wend.*, 285; 291-3; *Meakin* agt. *Anderson*, 11 *Barb.*, 215, 223-4; *Harrington* agt. *Bigelow*, 2 *Denio*, 109; *Brisbane* agt. *Adams*, 1 *Sandf.*, 195-8; *Halsey* agt. *Watson*, 1 *Cairns*, 24; *Pike* agt. *Evans*, 15 *Johns.*, 212, 213; *Graham & Waterman on New Trials*, vol. 1, pp. 495-6, 472, 478, vol. 3, pp. 1074, 6, 7, 8; *Tripler* agt. *Ehehalt*, 5 *Robt.*, 609-10; *Sproul* agt. *The Resolute Fire Ins. Co.* 1 *Lansing*, 71.)

VI. A new trial will not be granted in any case, on the ground that the verdict is against evidence, when the testimony is conflicting, or where there is evidence on both sides—unless the verdict so strongly preponderates against the evidence as to evince passion, prejudice, &c., on the part of the jury (*Murphy* agt. *Boker*, 3 *Robt.*, 1; *De Fonclear*, agt. *Shottenkirck*, 3 *Johns.*, 170; *Eaton* agt. *Benton, et al., Ex.*, 2 *Hill*, 576, 578; *Keeler* agt. *Fireman's Ins. Co. of Albany*, 3 *Hill*, 251; *Fleming* agt. *Executors of Hollenback*, 7 *Barb.*, 271; *Hull* agt. *Morrison*, 3 *Bosw.*, 520; *Lewis* agt. *Blake*, 10 *Bosw.*, 198; *Arnoux* agt. *Homans*, 25 *How.*, 427; *Cothran* agt. *Collins*, 29 *How.*, 155).

VII. There is no ground for the exceptions taken upon the trial, they are clearly frivolous (*Allen* agt. *Bodine*, 6 *Barb.*, 383; *Porter* agt. *Ruckman*, 33 *N. Y.*, 210; *Rundle* agt. *Allison*, 34 *N. Y.*, 180, 184; *Bronson*, *Recciver, &c.*, agt. *Tulhill*, 3 *Keyes*, 32; *Murray* agt. *Smith, Adm., &c.*, 1 *Duer*, 412; *Worrall* agt. *Parmelee*, 1 *Comst.*, 519; *Shorter* agt. *The People*, 2 *Comst.*, 193; *Ashley* agt. *Marshall*, 29 *N. Y.*, 494.)

VIII. The court has no power to extend the time to appeal from a judgment, either directly or by setting it aside, and directing the entry of a new judgment (*Caldwell* agt. *Mayor of Albany*, 9 *Paige*, 572; *Monroe* agt. *Widner*, 11 *Paige*, 529; *Wait* agt. *Van Allen*, 22 *N. Y.*, 319).

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And what it cannot do directly it has no power to do by indirection.

By the court, McCUNN, J.—This is a motion for a new trial on the ground of newly discovered evidence. The controversy arose about a quantity of tobacco, which defendant, on the 7th of January, 1864, levied on as sheriff of the county. Plaintiff undertook to prove, that some few days before the levy by the sheriff, the property had been transferred to him through the assignment of warehouse receipts. The testimony, although very much shaken by a severe cross-examination, was believed at the time by the jury, and they found a verdict of nearly \$5,000 for plaintiff. Affidavits are now presented to us, showing that newly discovered evidence exists, and that that evidence will show this suit to be a conspiracy on the part of the plaintiff, and others, and that their design was to use this court, to enable them to carry out their fraud against the sheriff. I need not say, that if such a conspiracy exists, or has existed on the part of the plaintiff, as is shadowed forth in the affidavits, it is the duty of this court to intercept it at once.

The following principles are settled in regard to granting new trials on the ground of newly discovered evidence. The testimony upon which the motion is based, must have been discovered since the former trial. It must be such as could not have been obtained with reasonable care before. It must be material to the issue. It must go to the merits of the case, and not to impeach the character of former witnesses. It must not be cumulative; the facts must be strong, and the party offering them free from laches. The affidavits presented with the case here, show that the facts contained therein, were discovered since the trial. They show a conspiracy to enable suit to be brought against the sheriff, and these facts were not discovered until a quarrel took place after the trial between the plaintiff and the party from whom he claimed title, and the witness on the trial. It could

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not (the testimony) have been obtained until some of the conspirators disclosed the facts, because it was their secret, known to them alone, and could not be reached by physical industry. It is material, because it (the new evidence) shows that the plaintiff never owned a dollar's worth of the property sued for, and it does not impeach any of the witnesses, because none of them swore to this conspiracy before. It (the evidence now offered and set up in the affidavits) is not cumulative, for the reason that no proof of any kind was offered defendant going to show this conspiracy. The defendant is free from laches, because he applied to the court the instant the conspiracy was discovered. In fact, the testimony now sought to be introduced, is very material, and not cumulative. It relates to a point upon which no testimony was given on the trial. It relates to the vital point in the case. "Title in plaintiff."

It is true, that Raphelsky says he bought the property on the 4th, but he does not say, that the bill of sale and warehouse receipt were signed and indorsed on the 4th. It was the indorsement of the warehouse receipt and the signing of the bill of sale which gave him the title, and if these were not executed before the attachment by the sheriff, no matter whether dated back or not, his action fails. He says, he bought the goods on the 4th. He then had reference, no doubt, to the date of the bill of sale and the indorsement of the warehouse receipt which were both ante-dated, and not to the actual time of the transaction. They (the receipt and bill of sale) were dated on the 4th, but the affidavits now presented, clearly show that this was a false date, and that the bill of sale and indorsement on the warehouse receipt were gotten up after the Sheriff's levy, and that they were ante-dated, so as to bring the date before the sheriff's levy under the attachment. The question as to the time when the bill of sale and indorsement of the warehouse receipts were actually signed, never came up on the trial. It was supposed at the time of trial, they were executed on the 4th.

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It never entered the minds of anyone, that this was a conspiracy, and (about the dates of these instruments) that the papers were dated back. It now appears, by the wife of the person whose property the tobacco was, and from other reliable proof, that all the papers were a fraud. We must reasonably conclude, that the jury had they had before them the facts contained in these affidavits, disclosing the newly discovered evidence, attached to the case in this cause, their verdict might have been affected by them, and they might have found for defendant. These facts had not been disclosed at the time of the trial, but were discovered some time after; and as soon as they were discovered, application was made at once. There is, therefore, no laches imputable in not giving them in evidence.

If the sheriff's affidavits be true, he is placed here under great difficulties. When an officer of the law is under real disadvantage, and is at a loss how to act, the court must endeavor to help him, as far as possible, away from these difficulties; at the same time, it must see that no wrong is done the other party. In regard to the law governing this case, first, as to the absolute rule of 1799, denying new trials after the entry of judgment and without a stay for that purpose, the court, in many instances, in construing the rules of 1799, laid them down so rigidly, that in many cases suitors found unreasonable difficulties in their way—difficulties and inconveniences worse than those which the rules were intended to correct. Indeed, these stern rules (1799) were so far disused and disregarded, and so little put in force down to 1832, that in many cases, the rule was forgotten, and motions were often made and granted for new trials after judgment, without even a knowledge of the rule being in existence (*Roosevelt agt The Heirs of Fulton*, (7 Cow., 107).

The sound maxim of policy is, that a greater evil should be avoided for a less, and a less good should give way to a greater. The rules of 1799 were harsh and oppressive, and

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the courts acting under them seldom or ever enforced them twice out of three times during a period of thirty-three years. They skillfully or intentionally avoided them, and after years of experience, finding the rule worked badly, in 1832, the legislature, at the solicitation of the courts, passed an act under which a new practice was inaugurated, and this statute allowed the granting of new trials after judgment, and even after execution was issued (*Chap. 12, § 1, laws of 1832*). It must be borne in mind, that no former act had fixed the rules and practice. The rules of 1799, these technical rules I speak of were simply adopted by the court, without the aid of the legislature, and these rules were always relaxed where good faith was shown by the parties. From 1832, until the adoption of the Code in 1848, and '9, an express statute (*Session laws 1832, chap., 12*), and the rules of the court passed in conformity therewith, authorized motions for new trials on newly discovered evidence after judgment. Such motions were constantly made at special term held every three months, and if judgment had been entered and collected, it was set aside, and restitution ordered. Under the Code of 1848, and '49, a new system was being inaugurated. It was a mooted point whether new trials could be granted, the doubt being created by the provision of the Code of 1849, section 265, as to judgment becoming final after four days; but even then it was held that if a formal stay was merely granted within the four days, a motion might be made any time after judgment (2 *Sandf.*, 681). Under the Code, however, of 1851, and '52, the four day provision contained in section 265 of the Code of 1848, and '9, and the provision for a stay were dropped entirely, and as the Code now stands, there is nothing prohibiting such motion, so that the Code is in harmony with the act of 1832, and with the rules and practice established thereunder. I say, in harmony with the act of 1832, because section 389 of the Code of 1848, and section 469 of the present Code provide, that the then existing (present) rules and practice of the

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court that were consistent with that act, "shall continue in force subject to the powers over the same of the respective courts as they now exist," and as this section of the Code is now in force: it must follow, that the practice of allowing motions for new trials after judgment and without a stay established by the act of 1832, is in full force and effect, and apply to our present practice, and the rules of 1799, do not apply. On the contrary, the rules of 1799, were wholly abrogated by virtue of the act of 1832; so that they do not now exist at all. Such was the practice laid down by Mr. Justice SLOSSON of this court, in the case of *Benedict agt. Caffé*, (3 *Duer*, 669). That learned judge says, "the entry of judgment does not prejudice the motion for a new trial on the ground of the verdict being against evidence, &c. The terms of this rule (rule 8 of the superior court) plainly imply, that such a motion may be made notwithstanding the entry of judgment. And we find nothing in the provisions of the Code inconsistent with it." This rule was also established in *Maloney agt. Dows*, (18 *How.*, 27), and in *Allego agt. Duncan*, (20 *How.*, 210). It has been stated in the learned opinion below (on this motion), that the decisions in this court since the Code, were uniform in not granting motions for a new trial after judgment. My learned brother must be in error in this regard, because I find, (as I have just cited), that Mr. Justice SLOSSON, (3 *Duer* 699), in a case immediately in point, holds that the entry of judgment does not prejudice a motion for new trial. The case in 2 *Sandf.*, 681, in fact, decides the question in the way I contend, but only in a more indirect form, because there a new trial was ordered, and that after judgment. The cases in 4 *Bosw.*, 503, and 5 *Bosw.*, 73, and 7 *Bosw.*, 400, and 26 *How.*, 199, cited in the learned opinion below against our views, were decisions made under the impression that the rules of 1799, in the absence of anything to the contrary in the Code, were in full force and effect. And the very learned judges in deciding those cases, unintentionally no doubt, leaped over

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the decisions of sixteen years ; decisions made under the acts of 1832 and the rules framed thereunder, which expressly gave the right to make these motions at any time, without stay and without motion for leave for that purpose, and which act still stands in full force and effect. Nay, more, as I have before stated, that act absolutely abrogated the rigid rules of 1799, so that it seems that the learned judges deciding the cases above mentioned, utterly ignored, or had forgotten, the laws of 1832. Again, my learned brother in deciding this motion below, fell into another error, in saying that only one case is to be found in the supreme court exhibiting a contrary doctrine to his views. With the very highest regard for that learned brother's research and attainments, I beg to be permitted to call attention to three cases in that court ; the case of *Mersereau* agt. *Pearsall*, (6 *How.*, 294) ; *Tucker* agt. *White*, (27 *How.*, 96,) *Tucker* agt. *White*, (28 *How.*, 78). In all of them are to be found learned opinions (opinions by the court) indicating and establishing a contrary doctrine. I find also, in the common pleas, *Maloney* agt. *Dows*, (18 *How.*, 27), a very able opinion of Chief Justice DALY. That learned judge shows conclusively that the practice under the act of 1832 is now in full force and effect. "The Code," Judge DALY says, "has made no material change (from the laws of 1832) as to the course of procedure, where the object is to obtain a new trial." But the four cases cited from the supreme court, in the learned opinion below, do not, in my opinion, show that this question has been decided in that court adversely to our views, because in three cases out of the four, the motions were actually heard and decided, and new trials granted on the merits, notwithstanding the dicta of some of the judges on this question of practice, and the other (15 *Johns.*, 353), was decided under the old rule of 1799 and before the laws of 1832 were passed. And in the case of *Gurney* agt. *Smithson*, in supreme court, the reasoning of the learned judge in that court and his decision were based on false premises, having entirely overlooked the fact

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that the practice under the act of 1832 prevailed for sixteen years immediately preceeding the enactment of the Code. We now come to the most important case yet cited (*Folger* agt. *Fitzhugh*, 41 N. Y., 288), a decision which we now must follow implicitly. Notwithstanding our learned brother's (below) construction to the contrary. Mr. Justice GROVER, wrote the opinion, holding that a motion could be made for a new trial after judgment, and four others of those learned men (MASON, MURRAY, DANIELS and HUNT), concurred, and Mr. Justice WOODRUFF held, that the supreme court had inherent power and control over its own judgments, and certainly, this view of Mr. Justice WOODRUFF amounted to the same thing. It was, in fact, holding that the court could grant new trials after judgment. The other two learned judges, JAMES and LOTT, dissented. Mr. Justice JAMES, writing a short opinion dissenting from the practice of granting new trials after judgment. Mr. Justice LOTT saying nothing on this subject. So that we have six judges holding, in that case, that the courts below have the power to grant new trials after judgment, and that they have inherent control over their own judgments, and certainly, the court can only have inherent control for the purpose of seeing manifest justice done and correcting errors, and relieving suitors from oppression, wrong, mistakes, or misfortunes where justice requires it, by granting relief in the way of new trials or otherwise after judgment, and while I must, and shall at all times, pay the utmost deference to the views of my brethren, sitting below, yet I must repeat that the right to grant new trials after judgment, came up in the *Folger and Fitzhugh* case, was fully and ably discussed, and that six of the judges held, beyond peradventure, that the court had a right to grant new trials after judgment; and that only one of the judges (JAMES) dissented from that view, LOTT being silent on the question; and the dissent of Justice JAMES was placed, as I learn, on mere technical grounds of practice. The learning displayed and the law

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laid down in this case (*Folger agt. Fitzhugh*), by the court of last resort, is the humane, sound and correct rule. It brushes away all technicalities, it settles the question, and places the rights of injured suitors beyond the reach of technical and uncertain minds. The decision in that case (*Folger agt. Fitzhugh*), has made this sound rule definite, certain and notorious, at the same time, it avoids delay and saves large expense and time to the parties. All the decisions, to the effect that a motion for a new trial cannot be made after judgment and without a stay, are based upon the technicalities of the old practice of 1799, and are not in harmony with the spirit of modern jurisprudence. There is no reason in such a rule, and its enforcement would sometimes work great injustice, as the case at bar fully illustrates. The enforcement of such a rule would practically prevent the granting of new trials on the ground of newly discovered evidence. How can a defendant move for new trial when he is ignorant of the facts which justify it, or render it necessary. Newly discovered evidence, to be available for such a motion, must, of necessity, have been discovered after trial, as in this case. Here the plaintiff based his rights to recover on a bill of sale, or the indorsement or transfer of a warehouse receipt from one Salamon, dated January 4th, 1864, and he, plaintiff, and his witnesses swore on the trial, that the said bill of sale and receipts were executed on the day they bore date, 4th January, 1864, and upon the sole strength of such swearing, the plaintiff recovered. It is now clearly shown by proof, to my mind reliable, that the witnesses perjured themselves, and that no sale took place until days after the sheriff had attached the tobacco—that the bill of sale and warehouse receipt were both ante-dated so as to make them read, and take effect before the attachment and levy. Now, in the name of justice, would it be right to deprive the sheriff, a public officer acting in the line of his duty of an opportunity to show the truth of the statements contained in his affidavits. The order at special term should be

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reversed. We have not considered the order made by Mr. Justice SPENCER, opening the case and allowing the motion for a new trial to be made. That order was disregarded by the learned judge below on the hearing of this motion for a new trial. We think, this was correct, because we can only believe that the motion to open the judgment and allow this motion to be made, was done in accordance with absolute technicalities unnecessary now to be resorted to. And we believe that the discussion of the original motion, without the aid of Mr. Justice SPENCER's order for a new trial, both as to the facts and the law, was properly understood by the learned judge who decided the motion on its merits; but we hold that he committed error in denying the motion.

Chief Justice BARBOUR and Mr. Justice JONES concurred.

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N. Y. SUPERIOR COURT.

CHARLES H. SWORDS and another agt. ADONIRAM J. OWEN.

The act of 1835 (*L. 1833. Ch. 281*), entitled an act to prevent persons from transacting business under *fictional names*, prohibits the *transaction of business* in the name of a partner not interested in the firm, and requires that the designation "and company" or "and Co." shall represent an actual partner. A violation of the statute is deemed upon conviction a misdemeanor punishable by fine.

This being a penal statute, it implies a *prohibition*, and every act done against it is not only illegal but absolutely void.

The prohibition being against *transacting business*, it renders it unlawful for a person to conduct his business under the designation of "and company" or "and Co." unless such addition represents an actual partner, and such person cannot make any *executory contract* whatever, which can be enforced by him, while using such prohibited title.

Where this statute defense was interposed to a complaint by the plaintiffs who were alleged to be partners doing business under the firm name and style of "Swords, Betty & Co.," and the employment of the plaintiffs by the defendant as his brokers, to purchase stock—the purchase thereof—the neglect and refusal of the defendant to take the same, and a loss thereupon to the plaintiffs of \$3,000:

Held, on demurrer to such defense for insufficiency, that the judgment of the special term overruling the demurrer be *affirmed*, with costs.

Heard at the March General Term, 1872.

Before MONELL, FREEDMAN and CURTIS, JJ.

APPEAL from an order overruling a demurrer to one of the defenses.

THE complaint alleged that "the plaintiffs, were copartners doing business in the city of New York, under the firm name and style of Swords, Betty & Co." It then alleged as a cause of action, the employment of the plaintiffs by the defendants as his brokers, to purchase certain shares of stock; the purchase of such stock, the neglect and refusal of the defendant to take the same, and a loss thereupon to the plaintiffs of three thousand dollars.

The defendant, for a third defense, averred upon informa-

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tion and belief, that all the alleged transactions were wrongfully, unlawfully and wickedly made by the plaintiffs, in carrying on and transacting business, including that set forth in their complaint, under the firm name and designation of Swords, Betty & Co., and that the designation "& Co." did not then and there represent an actual partner, nor partners, and that said firm were carrying on business in the city of New York, and said copartnership was not a commercial copartnership, located and transacting business in foreign countries; neither had such copartnership used such name of Swords, Betty & Co., and the business conducted by it at any time thereafter continued by some one, nor by any of the copartners, nor by their assigns or appointees, neither was any certificate signed and acknowledged before any officer of law, authorized to take acknowledgments of deeds, declaring the persons dealing under said name of Swords, Betty & Co., with their places of abode, nor was such certificate filed with the clerk of the city and county of New York, in which their principal place of business then and there was, neither was the same published in any newspaper in this state, neither had said copartnership business relations with foreign countries.

To this defense the plaintiffs demurred, for insufficiency.

The court, at special term overruled the demurrer, and the plaintiffs appealed.

R. H. HUNTLEY, *for appellant.*

This appeal brings up the question whether the contracts of a firm doing business with "& Co.," attached to the firm name, there being no one to represent the "& Co.," as required by statute, are invalidated by the failure to comply with the requirements of the statute, which reads as follows (*Laws of 1833, chap. 281*).

"Section 1. No person shall hereafter transact business in the name of a partner not interested in his firm, and where

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the designation 'and Company,' or '& Co.' is used, it shall represent an actual partner or partners.

"Section 2. Any person offending against the provisions of this act, shall, upon conviction thereof, be deemed guilty of a misdemeanor, and be punished by fine not exceeding one thousand dollars."

I. A contract which has a penalty affixed by statute, is, of course, void; but the invalidity of a contract so prohibited does not impair a contract founded upon a new consideration and otherwise valid, collateral to the void contract, but not depending upon it.

"The test, whether a demand connected with an illegal transaction, is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case" (*Chitty on Contracts*, Springfield ed., 657, and cases cited).

The rule is thus stated by Chitty, in *Fergusson* agt. *Norman*, (6 *Scott*, 794), *TINDAL, Ch. J.*, draws a distinction between the neglect to perform acts, the performance of which is required by statute, but which are not collateral to the contract, but are to precede, or to accompany and form a part of it, and acts which are collateral and distinct from, and wholly independent of, the contract itself, and puts the following instance: Section 23 of 39 and 40 Geo. III. ch., 29, requires under a penalty of £10, that the pawnbroker's names and business shall be painted over his door; suppose this were altogether omitted or incorrectly done, the party would be liable for the penalty; but it could scarcely be contended that all contracts entered into by him as pawnbroker would, therefore, be avoided" (*Chitty on Contracts*, 697).

The case here put by *TINDAL, Ch. J.*, is precisely analogous to the case at bar, and the claim of the defendants is exactly the one condemned by him. Although the plaintiffs may be liable to the penalty prescribed by statute for doing business under a firm name forbidden by statute, the contracts of such firm are not, therefore, void for illegality.

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This distinction is also clearly expressed in *Story on Contracts*, 3d ed., 649, § 621, as follows :

"A distinction is to be observed between cases where the contract is directly in violation of the statute, and cases where it is collaterally connected with some incidental illegality not contemplated in its terms. If the illegality do not form a portion of the contract, but be entirely collateral and capable of complete separation therefrom, it will be binding."

On this point is cited the case of *Johnson agt. Hudson*, (11 *East.*, 180), where a vender of tobacco failed to comply with the statute regulations requiring a license. In an action against a purchaser, this failure was set up as a defense ; but the court held that the contract of sale was collateral, and that the seller could sue.

Johnson agt. Hudson, was regarded as decisive, and followed in the subsequent case of *Smith agt. Mawhood*, (14 *Meeson & Welsby*, 452), which cannot, in principle, be distinguished from the case at bar.

"Where an act is absolutely prohibited by statute, or is contrary to public policy, all notes, &c., given in furtherance of that act are null and void ; but where the statute fixes a mere penalty, contracts in relation to matters which subject the maker to that penalty are not invalidated" (*Hill agt. Smith*, 1 *Morris*, 70 ; 8 *U. S. Digest*, 13).

"A contract, the consideration or object of which is in violation of law, is void, and a court of justice will not lend its aid to enforce it ; but a subsequent contract, if unconnected with the illegal act, and for a new consideration, is valid, and will be enforced, although it may have grown out of the illegal transaction, and the party to whom the promise was made may have a knowledge of it" (*Smith agt. Barstow*, 2 *Douglas*, 155 ; 9 *U. S. Digest*, 20 ; and see *Harris agt. Runnels*, 12 *How. U. S.*, 79).

II. An illegal contract does not invalidate a subsequent contract, not an inseparable part of the illegal contract,

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though having reference thereto, when the subsequent contract is founded on a new and valid consideration.

In *Armstrong* agt. *Toler*, (11 *Wheaton*, 258), MARSHALL, Ch. J., delivering the opinion of the court, it was held, that although where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not enforce it; yet where an unlawful act has been done—e. g., an unlawful importation of goods—a subsequent independent contract in reference thereto, such as to advance money to procure their delivery, being founded on a new consideration, is not avoided by the illegal importation, although such illegal importation was known to the person advancing the money, when the contract was made, provided he was not interested in the goods and had no previous concern in their importation.

In the *Ocean Insurance Co.* agt. *Polleys*, (13 *Peters*, 159), STORY, J., says:

“We all know that there are cases where a contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote.”

In *Thornburg* agt. *Harris*, (3 *Coldwell, Tenn.*, 157, 28 *U. S. Digest*, 16), it was held that where, after an illegal act was done, a new contract, wholly unconnected with the illegal act, is formed, founded upon a new consideration, and no part of the original scheme, the new contract in itself was not unlawful.

III. So, when a contract is innocent, and in carrying it out there is a violation of a statute, this does not avoid the contract, though the offender may be punished for the violation (*Branch Bank* agt. *Crocheron*, 5 *Ala.*, 250; 4 *U. S. Dig.*, 69; see also *Favor* agt. *Philbrick*, 7 *N. Hamp.*, 326; 4 *U. S. Dig.*, 69; *Coombs* agt. *Emery*, 2 *Shep.*, 404, same page of digest.)

IV. *Ferdon* agt. *Cunningham*, (20 *How.*, 154); *Best* agt. *Bauder* (29 *How.*, 489), and other cases of a similar character,

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only prove, what nobody denies, that a recovery cannot be had upon a contract which is itself prohibited by statute, by affixing a penalty or otherwise; they do not in any case assert or imply the invalidity of subsequent contracts collateral to the prohibited contract.

Hoyt agt. *Allen*, (2 *Hill*, 322), cited by the defendant, is a direct authority for the plaintiff. The pleading there was as good as it is here, and no better; and as a question of pleading purely, the decision was against the defendant.

The substance attempted to be set up as a defense, is not passed upon except negatively, and that seems to be against the validity of such matter as a defense.

Judge COWEN says: "Admitting the principle of the plea is correct, still it is impossible to support it." Such is not the language in which courts affirm "principles." The inference is all the other way.

The law is liberally, yet perhaps, correctly, stated by the reporter in his note to the case on p. 323.

"Every contract made for, or about any matter or thing," &c. But in the case at bar, the contract made "about the matter or thing," is not prohibited by statute, and the rule, therefore, does not apply.

V. The order overruling the demurrer should be reversed, and judgment on the demurrer ordered for plaintiffs, with costs.

D. M. PORTER, *for respondent.*

Plaintiffs sue to recover for differences on stock transactions; for "a third defense," the defendant avers that all of the alleged transactions were wrongfully, unlawfully and wickedly made by the plaintiffs in carrying on and transacting business, including that set forth in the complaint, under the firm name and designation of Swords, Betty & Co., and that the designation "& Co." did not then and there represent

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an actual partner nor partners, and the answer (in this defense) negatives the exception in the statutes.

(a.) The demurrer admits the facts in the defense demurred to (*Hall agt. Bartlett*, 9 *Barb.*, 297).

(b.) The statute relied upon by the respondent is entitled, "an act to prevent persons from transacting business under fictitious names," and was passed April 23, 1833 (3*d Rev. Stat.* 5*th ed.*, 978). The first section prohibits the use of the words "& Co.," unless it represents an actual partner or partners. The second section makes it a criminal offense, punishable by a fine. The law is prohibitory, and the plaintiffs, in making the identical contract sued upon, did what this statute expressly prohibited them from doing. The plaintiffs cannot recover on a contract made by them in a manner prohibited by law.

(c.) This is so, even if the law does not prohibit, but simply imposes a penalty (but the statute under consideration, as before stated, expressly prohibits). (*Wheeler agt. Russell*, 17 *Mass.*, 258; *Ferdon agt. Cunningham*, 20 *How.*, 154; *Beman agt. Tugnot*, 5 *Sandf.*, 153; *Bell agt. Quinn*, 2 *Sandf.*, 146; *Griffith agt. Wells*, 3 *Denio*, 226; *Seneca County Bank agt. Lamb*, 26 *Barb.*, 595; *Barton agt. Fort Jackson and U. F. P. R. Co.* 17 *Barb.*, 397; *Jackson agt. Walker*, 5 *Hill*, 27; *Porter agt. Havens*, 37 *Barb.*, 343; *Coppell agt. Hall*, 7 *Wall.*, 542; *Hoyt agt. Allen*, 2 *Hill*, 322; *Law agt. Hudson*, 11 *East.*, 300; *Little agt. Poole*, 9 *Barn. & C.*, 192; *Foster agt. Taylor*, 5 *B. & Ad.*, 886; *Abbott agt. Rogers*, 16 *C. Bench*, 277; *Hall agt. Franklin*, 3 *Mason & W.*, 259; *Best agt. Bander*, 29 *How.*, 489; *De Groot agt. Van Duzer*, 20 *Wend.*, 390; *Pennington agt. Townsend*, 7 *Wend.*, 280; *Hallett agt. Novion*, *op. of THOMPSON*, 14 *Johns*, 290; *Chitty on Contracts*, 6*th ed.*, 443, 767-8; *Collier on Partnership*, § 645; *Parsons on Partnership*, 5*th ed.*, 341, 458).

(d.) The object of this statute is the protection of the public from fraud, and not a mere revenue regulation (*See*

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Story on Contracts, 443, 767-8, 10 a. ed), Its title is, "to prevent persons from transacting business under fictitious names."

(e.) The plaintiffs come into court, and admit themselves guilty of a crime, and they must be left without remedy, for the reasons stated by Lord MANSFIELD in *Holman agt. Johnson*, (*Cowper* 343), in which he said "the objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff; not for the sake of the defendant, but because the court will not lend their aid to such a plaintiff."

(f.) The real test as applied by the courts to all cases which seem to be tainted with illegality, is to be applied to this, to wit: Can the plaintiffs maintain their action without relying upon their illegal act? If such act forms one necessary link in the proof of their case, or right to recover, they must fail (*Gregg agt. Wyman*, 4 *Cush.*, 322, and cases cited).

(g.) "When a contract grows out of, or is connected with an illegal act, the court will not lend its aid to enforce it. And if it be, in fact, connected with the illegal transaction, it is tainted with the illegality of the transaction from whence it sprung." It is void. It is not necessary to declare a prohibited act void, but it is void, because prohibited (*Barton agt. Fort Jackson & U. F. P. R.*, 17 *Barb.*, 397).

"When a contract springs out of a violation of the statutes of the state, the court will not lend its aid in enforcing it." "In such a case, a party cannot do an act prohibited by law, and then come into court and ask to enjoy the fruits of the transaction" (*Seneca Co. Bank agt. Lamb*, 26 *Barb.*, 595).

The order should be affirmed, with costs and disbursements (*The Erie Railway Co. agt. Ramsey*, 10 *Abb.*, N. S., 109).

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By the court, MONELL, J.—In 1833, the legislature enacted a statute embracing the following two sections (*Laws of 1833, chap. 281*).

"Section 1. No person shall hereafter transact business in the name of a partner not interested in his firm, and where the designation "and Company," or "& Co." is used, it shall represent an actual partner or partners.

"Section 2. Any person offending against the provisions of this act, shall, upon conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding one thousand dollars."

The act is entitled "an act to prevent persons from transacting business under fictitious names."

Literally, the statute prohibits the transaction of business in the name of a partner not interested in the firm, and requires that the designation "and Company," or "and Co," shall represent an actual partner. A violation of the statute is deemed, upon conviction, a misdemeanor punishable by fine.

The prohibition does not, nor does the penalty, in terms apply to contracts made by such firms, and does not, therefore, in terms declare such contracts void, but the act makes it unlawful for any person or persons to transact business by, or in the name of, a fictitious firm.

The answer alleges that the contract, upon which the cause of action arose, was made by the plaintiff, in carrying on and transacting business under the firm name of "Swords, Betty & Co.," and that the addition of "& Co." did not then represent an actual partner; and the allegation is admitted by the demurrer to be true.

The contract, then, was made by a person while unlawfully using a prohibited style, the using of which was a criminal offense, punishable by fine.

It is not necessary that a penal statute should contain prohibitory words. A penalty implies a prohibition, and every act done against it, is not only illegal, but absolutely void (*Hallett agt. Novion*, 14 J. R., 290).

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The prohibition is against transacting business; and it renders it unlawful for a person to conduct his business under the designation of "and Company," or "& Co.," unless such addition represents an actual partner; and such person cannot make any executory contract whatever, which can be enforced by him, while using such prohibited title.

It would be impossible to give significance and effect to the statute, unless it was adjudged to apply to all business transacted under the unauthorized name; and, therefore, to all contracts made in the name, or when using the prohibited style, rendering all such business transactions and contracts absolutely void.

The decisions in our state courts strongly support the views I have expressed; and quite uniformly hold, that all transactions prohibited by statute are void.

In *Hallett agt. Novion* (*supra*) an act of congress had made it a misdemeanor, punishable by fine and imprisonment, for a person to fit out and arm any ship or vessel with intent to employ her in the service of any foreign power, &c.

The act contained no words of prohibition, but the court held, as before quoted, that a penalty implied a prohibition, and every act done against it is void.

In *Pennington agt. Townsend*, (7 *Wend.*, 276), an act of the legislature made it unlawful for any person or association to keep an office for transacting banking business, &c., unless expressly authorized by law, giving a penalty.

In the act there was no clause declaring void the securities taken. The action was upon a check which had been discounted by an unauthorized banking association; and the court held the transaction void under the statute.

Judge NELSON, in referring to the proposition that the penalty was the only consequence of a violation of the act, says, "there is no distinction between an act *malum prohibitum* and *malum in se*. Both are equally forbidden and unlawful, and I will add, both are immoral, and cannot be

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the foundation of a civil right, that will be enforced in a court of justice."

In *Griffith agt. Wells*, (3 *Denio*, 226), the action was to recover for liquor sold by a person not having a license. The act of the legislature did not, in terms, prohibit the sale of liquors without a license, nor declare the act illegal. It only inflicted a penalty upon the offender. But the court held the contract to be illegal, and no action would lie to enforce it.

An analogous case was decided in the N. Y. common pleas (*Ferdon agt. Cunningham*, 20 *How.*, 154), where a contract for service by a public cartman, was held to be void, the cartman not having a license, as required by a city ordinance, which merely affixed a penalty for keeping or using a public cart, without first obtaining a license therefor.

Best agt. Bauder (29 *How.*, 489), although only a special term decision, is strongly in point. The action was for goods sold. The defense was, that the seller was engaged in the business of peddling, without a license, in violation of the revenue laws of the United States. The court overruled a demurrer to the defense, holding that the penalty in the act implied a prohibition, rendering the contract of sale void. In that case, the distinction which is suggested in some of the cases (*Griffith agt. Wells*, *supra*, and *Bell agt. Quinn*, 2 *Sandf.*, 150), between a license for revenue only, and such as have in view the protection of health or morals, or the prevention of fraud, is repudiated.

In *Hoyt agt. Allen*, (2 *Hill*, 322), although the decision was as to the sufficiency of the pleading, there is an intimation which, taken in connection with the reporter's note, sustains the principle of all the foregoing cases. And the principle is further supported by the case of the *U. S. Bank agt. Owens*, (2 *Peters*, 527), where a contract was held void as being in violation of the charter of the bank, forbidding the taking of more than six per cent. interest.

Under the authority of the cases cited, we must hold the

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transaction set forth in the complaint to be illegal and void, and not enforceable in the court of justice; and, therefore, that the matter set up in the answer, constitutes a defense to the action.

It is impossible, I think, to apply the distinction in this case, claimed by the respondent's counsel, that this is a mere collateral transaction, not connected with, but remote from, the prohibited act. Such distinction clearly defined in the cases he has referred to where it is held, that if the illegality does not form any portion of the contract, but is merely collateral, and capable of complete separation from it, the contract is binding.

The distinction, however, cannot be made available in this case. The illegal act is the transacting of business. Business cannot be transacted except by and under contracts express or implied, executory or completed. Every executory contract made in transacting business, must, necessarily, therefore, be void under the prohibition against transacting business, under a fictitious firm name. Any other application of the statute would render it wholly ineffective, as the design of the legislature as expressed in the title of the act, was, to prevent persons from transacting business under fictitious names.

In their complaint the plaintiffs aver, that at the time they made the contract with the defendant, they were doing business under the firm name of "Swords, Betty & Co.," and the answer alleges that the transaction was made with the plaintiffs, while unlawfully transacting business under such fictitious firm name.

These several allegations, are, in my opinion, sufficient to bring the case within the provisions of the statute prohibiting the transacting of business in the name of a partner not interested in the firm.

The order appealed from should be affirmed, with costs.

Sullivan agt. Warren.

SUPREME COURT.

TIMOTHY SULLIVAN, respondent, agt. LYME E. WARREN,
appellant.

In an action for alleged false and fraudulent representations in the purchase of a suit of clothes by the defendant of the plaintiff, upon a credit given upon the alleged statement by the defendant that he was a law-partner of one M. :

Held, that the production on the trial of M.'s law register (M. being dead), to show that defendant was not a law-partner of M. at the time of the purchase, was of itself incompetent to prove the falsity of such alleged representation.

Also parol evidence that M. kept a justice's court register and day book, which were not produced, wherein it did not appear that defendant was a law-partner of M. was also incompetent to prove the falsity of the alleged representations.

Evidence by the deputy county clerk that during the time that defendant was alleged to be a law partner of M. that M. had pigeon holes in the clerk's office where his law papers were kept when filed, and that such papers did not show that defendant was a law-partner of M. was incompetent to prove such alleged false representations.

Also that G. a lawyer, had, at the time, an office in the same block with M. and had more or less business with him ; that defendant was in the office with M. but that the witness never did any business with them as partners, was insufficient to show that defendant was not a partner of M.

Fraud of this description, is a crime, subjecting the party guilty of it to indictment and conviction for felony, and the party who claims the advantage of it, to aid him in the collection of a debt, must see to it, that it is established by some clear and substantial evidence.

Fourth Department, January Term, 1872.

Before MULLIN, P. J. and JOHNSON and TALCOTT, JJ.

THE facts in the case sufficiently appear in the opinion of the court.

SANDERS & BEACH, *for plaintiff.*

BOUTON & CHAMPLIN, *for respondent.*

By the court, JOHNSON, J.—The action was for an alleged

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fraud, practiced by the defendant upon the plaintiff in the purchase of a suit of clothes.

The fraud is set out in the complaint, and consists in an alleged false and fraudulent representation by the defendant, that he was a law-partner of one John Molloy, a lawyer, residing in Syracuse, whereby he obtained said clothes on credit. Of course, the burden of proving the representation and its falsity, was upon the plaintiff. It was for him to overcome by his evidence, the legal presumption that the purchase was honestly and fairly made. The defendant denied, both in his answer and in his testimony upon the trial, ever making any such representation to the plaintiff, either when the clothes were ordered, or when they were delivered, but alleges and testifies that the clothes were purchased for him by Molloy, and on Molloy's credit.

The plaintiff testified on his own behalf to the representations alleged, and gave no other evidence on that question. For the purpose of proving the falsity of such representation, the plaintiff was allowed to introduce Molloy's office register as evidence, for the purpose of proving who were Molloy's law-partners, during this time, and that defendant did not appear therein to have been a partner.

It was admitted by the defendant, that one Dolbear was a partner of Molloy, up to May, 1868. The clothes were delivered in July, 1868. The witness by whom the register was identified, was also allowed to testify, that Molloy kept a day book and justice's court register, and that it did not appear by either of these books that defendant was a partner of Molloy. These books were not present, and the witness did not know where they were. This testimony was objected to by the defendant as incompetent for any purpose, and especially, that it was incompetent and improper without the production of the books, or proof of their loss.

He also objected to the introduction of the office register as evidence on the question, as a book kept by Molloy,

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whose entries or non-entries were no evidence, between plaintiff and defendant.

These objections were all overruled and the evidence received, and exception duly taken by defendant.

Molloy, as it appeared, died in 1869. It may be doubted, I think, whether the register was competent evidence in any aspect, or for any purpose between the plaintiff and the defendant.

But, admitting it to have been competent as a circumstance, it is clear enough that the proof of what did not appear by the other books, not produced or shown to have been lost, was wholly incompetent.

The books were the best evidence of what appear, or did not appear therein, and the admission of the parol proof was erroneous.

The plaintiff was also allowed to prove against the defendant's objection, by the deputy county clerk, that in the clerk's office, in 1868 and 1869, Molloy had pigeon-holes where his law papers were kept when filed, and that he had examined the papers there kept, and that such papers do not show that defendant was a law-partner of Molloy.

The ruling admitting this evidence was excepted to by the defendant.

The plaintiff was also allowed, under like objection and exception, to prove by R. H. Gardner, a lawyer of Syracuse, that he had an office, in the year 1868, in the same block with Molloy and had more or less business with him. That defendant was in the office with Molloy, but that he (the witness) never did any business with them as partners. This was all the evidence given, or offered by the plaintiff to prove the falsity of the representations.

If any of it was competent, it had but very slight tendency to prove, as an affirmative fact, that such partnership did not exist. All that was proved by this evidence was, that the register and the papers in the clerk's office did not show the existence of the partnership, and that Gardner did not know

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such fact, if it existed. And this is especially so, in view of the facts testified to by the defendant. He testifies that he was then a student in Molloy's law office, and had not been admitted to practice as an attorney. That he was in the habit of trying causes in justice's courts, and that he had an agreement with Molloy, that they should share equally in the expense and profits of all causes tried in justice's courts, and all such causes as should be appealed to the county court and there determined, and that they were partners to this extent, in law business and practiced together as such. Being a law student at the time, of course no one would expect his name to appear as a partner either in the register, or in the law papers filed in the clerk's office, and the evidence was thus rendered idle and fallacious.

The defendant gave evidence by another witness, who had had suits in a justice's court which had been tried by Molloy for him, tending in some degree to prove the existence of the partnership as the defendant claimed it to have been.

It is quite material to the defendant, whether the plaintiff shall have the right to take his body, in execution to enforce payment for the worn out clothes, which he once furnished to cover it. No order of arrest was granted, or as far as appears, asked for, when the action was commenced, but the complaint is framed under sub. 4 of section 179 of the Code.

It contains a statement of facts showing good cause for arrest, and an execution against the person may, therefore, be issued on the judgment against the defendant, under section 288, although no order of arrest was asked for, or granted, and served.

Fraud of this description is a crime, subjecting the party guilty of it, to the extent here complained of, to indictment and conviction for a felony, and the party who claims the advantage of it, to aid him in the collection of a debt, must

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see to it, that it is established by some clear and substantial evidence.

It is not to be inferred, but must be proved, and will not be allowed to be made out from mere conjecture, or loose inference from ambiguous and inconclusive circumstances, which are as consistent with honesty, as with falsehood. I am of the opinion, that this judgment should be reversed, both because improper testimony was admitted upon the trial and because there was no evidence sufficient to establish the fact of a false and fraudulent representation by the defendant.

Judgment reversed, new trial ordered, costs to abide event.

Fargo agt. Arthur.

SUPREME COURT.

WILLIAM C. FARGO, president, &c., agt. WILLIAM A. G.
ARTHUR, *et al.*

A reward was offered and published by the plaintiffs, as follows: "\$5,000 reward will be paid for the arrest and conviction, or information leading thereto, of the person or persons who attempted to murder, and did rob, the messenger of the Am. Merchant's Union Express Company, while crossing the railroad bridge at Albany, on Friday evening, Jany. 6, 1871. For the company, J. C. FARGO, Gen. Superintendent."

After trial, conviction and sentence of the prisoner, several persons claimed the award, in whole or in part.

In an action of *interpleader* by the plaintiffs, *held*, that it is a case peculiarly proper for such an action. The plaintiffs are ready to pay to the persons lawfully entitled. Some of the defendants claim the whole; some claim an equitable distribution. It is evidently a case in which the matter should be adjusted in one suit, and in which the plaintiffs do not know to whom they ought to pay the money.

Held, also, that although the reward, strictly construed, might be considered in the alternative, as an offer of that amount for two distinct acts each—for the arrest and conviction, or information leading thereto, yet a paper like this ought to be construed as the public, to whom it was addressed, would understand it, for \$5,000, only.

Practically, in this case, it appears that it was the information furnished by many parties, which led to the result—not a repetition of the same information, but information of independent facts. And upon the principle that "where there is no one individual who gives information that is of itself useful, but that several persons give different pieces of information, the whole combined leads to the apprehension and conviction of the offender," it is a proper case for an equitable distribution of the award among the claimants entitled thereto.

Albany Circuit, Special Term, February, 1872.

ACTION of interpleader.

WILLIAM J. HADLEY, *for the plaintiffs.*

MESSRS. HALE, BECKWITH, MATTICE, TREMAIN, GREENE,
CLUTE, MOAK, PECKHAM and BANCROFT, *for the
several defendants.*

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LEARNED, J.—This is an action of interpleader, brought to determine who, among numerous claimants, are entitled to the reward of \$5,000 offered by the American M. U. Express Company, after the robbery of Thomas A. Halpine, one of their messengers. The plaintiffs are the company, and they have brought into court the amount aforesaid. The defendants are the persons who severally claim to be entitled to the amount, or to a part of it. At about 8 P. M. on the 6th of January, 1871, Halpine was robbed and nearly murdered while on an express car on the Boston and Albany Railroad. The deed was done while the train was crossing the railroad bridge at Albany. On the 7th, the company published an offer in these words: “\$5,000 reward will be paid for the arrest and conviction, or information leading thereto, of the person or persons who attempted to murder, and did rob, the messenger of the Am. Merchant’s Union Express Company, while crossing the railroad bridge at Albany, on Friday evening, Jany. 6th, 1871. For the company, J. C. FARGO, Gen. Superintendent.”

No person was then suspected by the company, or the public authorities.

On the morning of January 8th, Thomas Braidwood informed Mr. Dwight, the superintendent of the company, that on the afternoon of Jany. 6th, he had seen John I. Filkins in a pawnbroker’s shop looking for a pistol, but that he did not buy one. In consequence of that information, Dwight saw Filkins that afternoon and became satisfied that he had some guilty knowledge of the crime.

On the morning of Jany. 7th, Robert A. Scott sent word to the police headquarters that he had sold a pistol on the day before and gave a description of the purchaser, and on the evening of the 8th, he had another interview with the police.

On the afternoon of Jany. 8th, William A. Whalen found, near the spot where the crime had been committed, the pistol with which it was done; and this pistol he gave, on the same day, through his mother, to one of the employees

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of the railroad, from whom the information of the discovery came to the public authorities.

On the evening of January 8th, Jeremiah Flood informed the superintendent of the railroad that he saw a person, known to him by sight but not by name, jump on the express car and ride to the depot on the evening of the robbery; and he gave the same information to Mr. Kyle, the special policeman of the railroad, on Monday. This person was proved to be Filkins.

During all this time Filkins was at his house, not arrested and not suspected by the public. On the 11th of January, in the early morning, he fled and was at once suspected by the public of this crime.

On the evening of January 12th, William H. Foos, of Ballston, left a telegraphic dispatch at the office in Ballston, to the police at Albany, that Filkins had breakfasted at his house and was on his way to Canada, or (according to other witnesses) to Galway. The dispatch was forwarded on the morning of the 13th.

George F. White, of Saratoga, late on the morning of the 13th, telegraphed to the police that a suspicious-looking man (who proved to be Filkins) stayed at his house and went away in the morning, saying that he was going to Canada. Mr. White's dispatch did not reach Albany until after the dispatch from Foos had been received.

On the 15th of January, Altentor Hall, of Whitehall, received a telegraphic dispatch from the Express Company, saying that Filkins was going towards Canada, and requesting that pursuit should be made. On the same day, Hall showed the dispatch to Herman Ingraham and Oliver Thomas of the same place. Ingraham ordered a team, and he and Thomas went in pursuit of Filkins. By Ingraham's advice, they went by Fort Ticonderoga. They were lost on the lake, and reached Fort Ticonderoga the next morning, the 16th. There Ingraham showed William A. G. Arthur the dispatch and proposed that he should go. Ingraham was ill and

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could not go on. Arthur and Thomas started that day from Fort Ticonderoga, in search of Filkins. They reached John D. Burwell's hotel, at Salmon Lake, and went on to Pottersville, where they put up for the night. At about eight o'clock on that evening, Filkins arrived at Burwell's house, on a stage driven by Charles F. Leland, and registered himself by a fictitious name. Immediately on his arrival, Burwell suspected him to be Filkins. After he had gone to bed, Burwell sent Leland and Joel Potter to Pottersville, for Arthur and Thomas, and they came back together about 11 P.M. That night these five men arrested Filkins. They brought him to Albany. He was subsequently tried, convicted of this crime, and sentenced to the state prison for twenty years.

All of the persons whose names have been mentioned as giving information, or as participating in the arrest, claim the reward or some part of it. Their views are very conflicting. Some claim that the person who first furnished any information which ultimately led to the conviction, is entitled to the whole amount. Some claim that the persons who made the arrest are entitled to the whole, exclusive of all others. Some claim that there should be an equitable distribution of the award among all, including those who furnished information and those who made the arrest. And still another claim is, that those who made the arrest are entitled to \$5,000 and those who furnished information to another \$5,000. Burwell, Thomas, Leland, Arthur and Potter, however agree to share among themselves whatever they or any of them shall be entitled to.

1. A case like this is peculiarly proper for an interpleader. The plaintiffs are ready to pay to the persons lawfully entitled. Some of the defendants claim the whole; some claim an equitable distribution. It is evidently a case in which the matter should be adjusted in one suit, and to which the plaintiffs do not know to whom they ought to pay the money (2 *Story Eq.*, §§ 806 and 29; *City Bk. agt. Bangs*, 2 *Paige*, 570).

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2. I am satisfied that this is an offer of only \$5,000 reward. Perhaps by a strict logical construction, it might be urged that an offer in the alternative for two things is an offer for each. But a paper like this ought to be construed as the public, to whom it was addressed, would understand it, and I think, no one would suppose it to be an offer of \$10,000. Besides, it is an offer for the arrest and conviction, or information leading thereto. Now, it is admitted that "conviction" is a pre-requisite condition before any one can claim the reward. Conviction must be preceded by arrest; and the information for which a reward is offered is such, as leads to arrest and conviction.

3. The case of *Fitch* agt. *Snedaker*, (38 N. Y., 246), holds that under such an offer, a person is not entitled to recover for anything done before the offer was made. In the present case, all the defendants base their claims on acts done after the offer. Their motives are immaterial (*Williams* agt. *Carwardine*, 4 *Barn. & Ald.*, 274).

4. Is there any reason to construe this offer as entitling either of the two classes, viz., he or they who informed and those who arrested, to the whole reward, exclusive of the other class? I think not; for these reasons, as above noticed, an informant or informants, could not be entitled to recover until conviction; and arrest must precede conviction. The offer for information then, would be a nullity, if any parties who should arrest would take the whole reward unless, perhaps, in the case that the arrest should be made by the Express Company, or in the case that it should be made by a public officer (*Hatch* agt. *Mann*, 15 *Wend.*, 45). I cannot, therefore, suppose that the offer was for the benefit of those who made the arrest, exclusive of those who gave information. So too, he or they who gave information ought not to exclude those who made the arrest, as the offer is for both. Unless, however, the next point to be considered shall establish a different rule.

5. It is claimed, that the person who first gave any infor-

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mation, however unimportant of itself, which with other information led to the arrest is entitled to the whole reward. To sustain this position, the case of *Thacher agt. England*, (54 *Com. Law*, 254), is cited. A reward was offered "on recovery of the property, and conviction of the offender." A. gave information that B. had admitted to him that he was the guilty party. Few days afterwards the plaintiff, a police constable, arrested B. and by his activity recovered the property and caused B.'s conviction. It was held that the plaintiff could not recover the reward. But the opinions of the judges do not lay down any clear principle. TINDALL, *C. J.*; says, that he thinks, the money should be paid to the person who first communicated the information which ultimately led to conviction; and that plaintiff did no more than his ordinary duty. COLTMAN, *J.*, says, possibly an action by plaintiff and A. might be sustained. MANLE, *J.*, says, that the reward should be divided among such persons as gave information and assistance in proportion to the value of their services. CRESSWELL, *J.*, says, that plaintiff was only acting as a peace officer, and therefore, it was A. who caused the arrest. Thus, the only point decided is, that the plaintiff could not recover, and two of the judges seem to place this on the fact of his being an officer. Nor was there any question that A.'s information, and that alone fixed suspicion on B.

In the case of *Lancaster agt. Walsh*, (4 *Mess. and Welsby*, 16), a reward was offered for information whereby bank notes, which had been taken by robbery, might be traced. Lord ABINGER, says, that such information means the first that is sufficient for the purpose. After such has been given it cannot be said that the party is informed by another telling him the same thing.

Those two cases differ from the present in this respect. The "first information" to which reference is had in the opinions, was such, as if true, fixed the crime on the party finally convicted. In the present case, all the information

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furnished was of suspicious facts. Some of them pointing to Filkins. Some not pointing to any one, and altogether not inducing the public officers, in fact, to make an arrest up to Filkins' flight. And the case of ~~Furmer~~ agt. Walker, (*Law Rep.*, 1 *Queen's Bench*, 641), recognises the difficulty which must exist where the information furnished is but remotely connected with the result.

6. Practically it seems to be true, that it was the information furnished by many parties which led to the result in this case. Not a repetition of the same information, but information of independent facts. Justice MAYLE in *Thacher agt. England*, states the condition of the present case. "It often happens that there is no one individual who gives information that is of itself useful; but that several persons give different pieces of information, the whole of which combined, leads to the apprehension and conviction of the offender."

This view was taken in *City Bank agt. Bangs*, (2 *Paige*, 570), and although upon the hearing before the V. C. (in 2 *Ed. Ch.*, 95), he held, that Bangs was entitled to the whole, yet it was on the ground that he only was the active party in causing the arrest. The V. C. in excluding Van Riper from a share, does so on the ground that his remarks were casual, and not intended to give information.

In the case of *Jones agt. Phenix Bank*, (8 *N. Y.*, 228), a reward of \$5,000 was offered. There were several claimants, and the matter was submitted to Chancellor KENT. He awarded \$1,000 to Jones, and the rest to others. The correctness of this adjudication is not involved in the decision above referred to. But it has the sanction of that learned jurist's name. A remark of the court, however, on page 233 suggests the possibility of an action by several plaintiffs, each having performed some part of the conditions, and all together having performed all the conditions of the offer.

It is said, that any division of the reward must be arbitrary. This is true, just to the extent that the reward itself is one

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arbitrary sum. The company might have offered a less or a greater sum. There was no market value for the arrest of the criminal, or for the information which would lead thereto. But the company chose to offer this arbitrary sum, to encourage and reward those who brought about the conviction of the criminal. While these judgments might differ as to the degree to which these several defendants contributed to the result; still the division of the reward among them then would not be arbitrary, but would be based on the relative value of their acts. In applying this rule, I have carefully considered what all these parties have severally done, and the relative value of their acts towards the end accomplished. And I have come to the conclusions following:

7. I do not think that Hall furnished any information, or arrested Filkins.

However, praiseworthy Ingraham's acts may have been, he did not effect the arrest. Whatever the agreement was between him and Arthur, that does not come into this case. He did not furnish any information to the company.

White's telegraphic dispatch was substantially the same information which Foos had previously given; and therefore, he cannot be entitled to share.

There was but one arrest, and the five persons who made it, are to share jointly. Of course, the number of persons engaged in the arrest, does not increase the aggregate which they should receive.

The plaintiff's costs with an extra allowance of 5 per cent, will be paid first out of the funds. The remainder is to be distributed among the defendants, exclusive of Hall, Ingraham and White, as follows:

To Burwell, Arthur, Leland, Thomas and Potter jointly, fifteen-fortieths.

To Flood, three-fortieths.

To Foos, Scott and Whalen, each five-fortieths.

To Braidwood, seven-fortieths.

Judgment accordingly.

Hoppock agt. Moses.

COURT OF APPEALS.

MOSES A. HOPPOCK and others, appellants, agt. LUCIUS
MOSES, executor, &c., respondent.

An agency to transact business for an individual, is terminated by the formation of a copartnership.

Where an *agent* has been in the habit of purchasing goods of a firm for and in the name of an individual, and subsequently purchases a bill of goods for, and has them shipped in the name of a *copartnership firm*, of which he asserts, at the time, that the same individual for whom he formerly purchased is a member, the selling firm are bound to take notice of the *termination* of the purchaser's agency.

The purchaser has no more authority by his acts or declarations in behalf of the new firm, to bind the individual for whom he formerly purchased by virtue of his former agency, than he had to take in a partner without the consent of such individual. As he had no authority from the latter to purchase goods in the name of the firm, his doing so was an assumption of authority of which the selling firm had legal notice by the manner of doing the business.

The declarations of an individual agent of one member of a firm cannot be used as evidence to prove a partnership against either member of the firm.

APPEAL by the plaintiffs from a judgment of the general term affirming a judgment of nonsuit entered at special term.

JOHN M. MARTIN, *for appellants.*

This action was commenced and tried in the life-time of the defendant, Chester Moses, to recover the price of certain goods sold to him through his agent, amounting to \$10,-464 67.

On the trial it appeared that the plaintiffs were merchants, doing business in the city of New York.

That the defendant was a manufacturer of cloth, carrying on that business, and residing at Marcellus, in this state.

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That he had an insolvent son named Curtis H. Moses, who had failed in business, and could not do business in his own name.

That he constituted this son his general agent to carry on the business of a general country store on his credit at Rochester, Minnesota, and for that purpose authorised his son to buy goods for him in the city of New York, where his credit was known to be good.

That the plaintiffs never saw nor had any personal communication with the defendant on this business, until after the sale in question, the business having been transacted with his son exclusively, as agent aforesaid.

That the son as agent, and on the credit of his father, purchased goods of the plaintiffs for this Rochester business, which were charged and shipped to the father at Rochester, by the direction of the son, and were paid for by the son, as agent of the father, in a regular course of business.

That in the spring of 1865, the same agent, after he had purchased a bill of goods of the plaintiffs in the ordinary course of this business, requested the plaintiffs to mark the goods so purchased, "Moses & Whallon."

That on being asked who Whallon was, and whether he had any money to put in the business? he said, "No, he had not; that he had been a clerk in another store in Rochester, and was a good salseman, and a very popular man there; and to get him in their store, they had taken him as a partner, and gave him a share in the business; that the business was just the same as it had been previous; that the business belonged to Chester Moses, entirely, just the same as it had been," and that the Moses of Moses & Wallon was Chester Moses.

That the plaintiffs believed they were selling the goods on Chester Moses' responsibility, as stated by his agent, knowing that his son and Whallon were both irresponsible, and that Chester was responsible; and that they (the plaintiffs) would not have sold or shipped the goods to any other Moses

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than Chester Moses, about whose responsibility they had inquired, and were satisfied.

That the plaintiffs had no notice that this agency had been terminated, or the business changed, until after the sale of the goods in question, in 1865 ; when the defendant, Chester Moses, having been threatened with a suit, made his first appearance to the plaintiffs, at their store in the city of New York and admitted that his son had been his agent in the business at Rochester, but alleged that he had ceased to be so before the goods in suit were purchased and, therefore, refused to pay for them.

Other and similar facts appear throughout the testimony, tending to show that the defendant clothed his son with such real or apparent authority as to enable his son by his acts and representations, to procure goods for this Rochester business, and defraud the plaintiffs out of their property, if the defendant is not liable to pay for them.

After the plaintiffs had rested, Mr. C. B. Sedgwick, one of the defendant's counsel, without assigning any special reason, moved to dismiss the complaint, which was granted, and the plaintiffs duly excepted to the decision.

The plaintiffs afterwards moved for a new trial at special term, and their motion was denied.

Whereupon the defendant entered judgment, from which, and the order denying a new trial, the plaintiffs appealed to the general term, where the judgment and order were affirmed, and judgment of affirmance duly entered.

From this latter judgment the plaintiffs appealed to this court.

I. On an appeal from a judgment of nonsuit, all disputed facts are to be decided in the plaintiffs' favor, and all presumptions and inferences from the evidence which he might ask from a jury, are to be conceded to him, and a simple exception is sufficient to enable him to review all questions of law arising from such facts (*Cook agt. N. Y. C. R.R. Co.*, 3

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Keyes, 476 ; *Labar* agt. *Koplin*, 4 *Comst.*, 547 ; *Pratt* agt. *Foot*, 9 *N. Y.*, 463).

II. On a general view of the testimony, it is apparent that the defendant appointed his son his general agent, with full discretionary power to conduct the business of a country store on his credit, out of the state in which he resided and beyond his immediate supervision and control.

This necessarily included authority, not only to buy and sell goods for the business, but extensive incidental authority, in respect to the manner of purchasing and transporting the goods—the procurement of a place for the business—the employment of assistants—the making of subsidiary contracts and representations—including representations concerning the circumstances and credit of his principal, and, generally, to use all such means and perform all such acts, as he might reasonably deem proper and conducive to its success (*Petgrave on principal and agent*, 88, and cases, as to general and incidental authority.)

In fine, he gave his son all the powers of a general agent to transact business for another in a foreign country (*Story on Agency*, §§ 85, 86, and cases ; *Hunter* agt. *Hudson River Iron and Machine Co.*, 20 *Barb.*, 493, *Op. Court*, 507).

III. By clothing his son with these general powers, he made himself liable for his son's representations, that he (the son) was still buying goods for his father's business at Rochester ; because such representations were essentially necessary to enable him to obtain the goods requisite to carry on the business—were in nowise inconsistent with Whallon's connection with the business as partner, and were fairly within the general scope and purpose of the son's general agency (*Hunter* agt. *Hudson River Iron and Machine Co.*, *supra* ; *Collen* agt. *Gardiner*, 21 *Beavan*, 540 ; *Story on Agency*, § 85, and cases ; *N. Y. Life and Trust Co.* agt. *Beebe*, 7 *N. Y.*, 364 ; *Story on Contracts*, § 135, and cases ; *Story on Agency*, §§ 134, 139, 451, 452, and cases.)

And in cases like this, where the representations were part

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of the *res gesta*, and where the inducement to the sale of the goods, the principal will not be permitted to deny such representations (*Bloomer agt. Denman*, 12 Ill., 247).

Not even when they are "outside of the agent's powers," if the facts are peculiarly within the agent's knowledge, and a third party acts upon them, as in this case (*Griswold agt. Husen*, 25 N. Y., 599).

In such cases apparent authority is the real authority as to all parties who deal with an agent innocently (*North River Bank agt. Aymer*, 3 Hill, 262; *Exchange Bank agt. Monteith*, 17 Barb., 171, 177; *Mechanics' Bank agt. New Haven R.R. Co.*, 13 N. Y., 599).

And the agent's authority will be liberally construed (*Pole agt. Leash*, and *Leash agt. Pole*, 9 Jur. N. S., 829; and 8 L. T. (N. S.), 645, H. L.)

IV. When one of two innocent persons must suffer a loss by the acts of a third, he who has enabled such third person to occasion the loss must bear it (*Lickbarrow agt. Mason*, 2 Term. 70; *Vallet agt. French*, 6 Wend., 615, 620; *Root agt. French*, 13 Wend., 572; *Sandford agt. Handy*, 23 Wend., 268; *Ash agt. Putnam*, 1 Hill, 302, 307; *Banks agt. Davis*, 2 Hill, 451, 465; *North River Bank agt. Aymer*, 3 Hill, 262; *Exchange Bank agt. Monteith*, 17 Barb., 171, 177; *Smith agt. Empire Ins. Co.*, 25 Barb., 497, 502; *Dunning & Smith agt. Roberts*, 35 Barb., 463, 467; *Rawls agt. Deshler*, 3 Keyes, 572; *Sprights agt. Hawley*, 39 N. Y., 441; *Wilcox agt. Routh*, 9 G. S. & M., 476; *Nicoll agt. Am. Ins. Co.* 3 Woodb. & M., 529, 533).

V. Under the rule established by these cases, the defendant is clearly liable to the plaintiffs for the goods sold on his credit, unless his agent's statement to them, that Whallon had become interested in the business as the defendant's partner, exonerated the defendant from such liability.

Why should the statement of the fact have that effect?

Whallon was confessedly irresponsible, and no credit was given to him. He was, in truth, a mere clerk or assistant

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in the business—called a partner by the agent, the better to promote the interests of the business for which he was his partner's general agent. No change in the nature or objects of the business was effected by the connection of Whallon's name with it; and none was made in the mode of doing it, except in charging, marking and shipping the goods—all of which was done by the special direction of the agent clothed with power to carry on the business in such manner and by such means as he might deem most likely to promote its interests.

Moreover, notice of Whallon's connection with the business came from the person who had always been sole agent to manage the business—who was the only person the plaintiffs saw or negotiated with about it, and who, at the same time, stated that the business was the same—the responsibility the same—the Moses the same, and his agency the same as they ever had been. If one statement tended to exonerate, why should not the other equally tend to bind his father?

In a case much like this, the supreme court of Vermont held the defendant liable (*Taggart agt. Phelps*, 10 *Verm.*, 318).

And the lords justices, on appeal from the master of the rolls, held that where a partnership was constituted a general agent, the subsequent change in the firm by the death of one of the partners, did not affect the agency, the duty being on the house (*Pariente agt. Lubbock*, 8 *De Gex.*, *MacNaughton & Gordon*, 5, 12).

VI. The plaintiffs had a right to rely on the representations of the son in the absence of any intelligence from the father; and if the latter intended to be no longer responsible for the acts and statements of his son in respect to that business, it was his duty to notify the plaintiffs of such intention, and then no loss would have been suffered (*Story on Agency*, §§ 470, 471, and cases).

VII. Suppose, the son's statements were wholly untrue and the introduction of Whallon's name into the business, and the

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direction of the plaintiffs to charge the goods to Moses & Whallon, were designed by the son to procure the goods, and at the same time exonerate the father from liability to pay for them, did not the father's previous conduct, in appointing his son his agent, and his neglect to give notice of a revocation, enable the son to succeed in his fraudulent design, and ought not the father to suffer for it, rather than the plaintiffs, under the rule above stated.

If the agency had actually been revoked, or the business changed, the father should have notified the plaintiffs of it, if he would make the revocation or change effectual to protect him against the subsequent dealings of the son with those who had been in the habit of supplying the son with goods on the father's credit (*Story on Agency*, § 443; 2 *Kent's Com.*, 614, and cases).

VIII. The fact that the plaintiffs changed the mode of marking and charging the goods, cannot reasonably be considered notice to the plaintiffs that the defendant's connection with the business, or his son's agency for it, had ceased—especially when the change was made by the direction of the agent, coupled with an assurance that there was no change in the business or the ownership of it, or in his agency to buy goods for it on his father's credit—under these circumstances, such changes would not be evidence of a change of credit even (*Storr agt. Scott*, 6 *Car.*, 241; *Thompson agt. Davenport*, 9 *B. & C.*, 86).

IX. If the defendant, by his silence as to the continuance of his son's agency for this business, has enabled the latter to induce the plaintiffs to sell their goods to irresponsible persons, he surely ought not to be permitted to deny such representations to the plaintiff's prejudice (*Broome's Com. Law*, 53, and cases; *Bank of Auburn agt. Putnam*, 3 *Keyes*, 343; *Craig agt. Ward*, 3 *Keyes*, 387).

X. The declarations of Curtis H. Moses, as general agent for this business, concerning his father's continued connection with it as a partner of Whallon, were the same in effect, as

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if made by the father himself (*Barry* agt. *Foyles*, 1 *Pet. S. C.*, 311; *State Bank* agt. *Wilson*, 1 *Dev.*, 484; *Curtis* agt. *Ingham*, 2 *Verm.*, 287, 289; *Mott* agt. *Kip*, 10 *Johns.*, 478; *Whceler* agt. *Hambright*, 9 *Serg. & R.*, 390, 396, 397; *Burt* agt. *Palmer*, 3 *Esp.*, 145; *Paletthorp* agt. *Furnish*, 2 *Esp.*, 511, note).

And such declarations being part of the *res gesta* are not hearsay, but original evidence, from which a jury might fairly be asked to find a verdict against the defendant as partner (1 *Taylor on Evidence*, 541, § 539; *Doe* agt. *Haskins*, 2 *Q. B.*, 212; *Cook* agt. *N. Y. C. R.R. Co.*, 3 *Keyes*, 476).

And the verdict would stand although Whallon is not joined in the action, he being a resident of another state (*Brown* agt. *Birdsall*, 29 *Barb.*, 549).

XI. If it be urged that the plaintiff's knowledge that Whallon had become interested in the business as partner, was enough to put them on inquiry as to the continuance of the agency, it is answered :

1st. That the agency being once established, they had a right to presume that it continued until notified to the contrary (*Walrod* agt. *Ball*, 9 *Barb.*, 271, 275; *Cooper & Peabody* agt. *Dedrick*, 22 *Barb.*, 516).

2d. That if inquiry was necessary, they made it of the only person with whom they had ever had any communication on the subject, and were told by him that it still continued (*Williamson* agt. *Brown*, 15 *N. Y.*, 354, 362, 363; *President, &c. of Westfield Bank* agt. *Cornen*, 4 *Trans. of Appls.*, 442, 444).

XII. The questions whether the agent had authority—and if he had, whether he exceeded his authority, and whether the defendant was Whallon's partner or not, were questions for a jury (*Thurman* agt. *Wells*, 18 *Barb.*, 500; *Boradaile* agt. *Lcek*, 9 *Barb.*, 611; *McMorris* agt. *Simpson*, 21 *Wend.*, 610).

XIII. And the evidence was sufficient to sustain a verdict for the plaintiff; and the judge erred in holding, as matter of

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law, that it was not. The judgment ought to be reversed, and a new trial granted.

HERVEY SHELDON, *for respondent.*

This action was brought by the appellants to recover the sum of \$10,464 50, for goods, alleged to have been sold and delivered to the defendant, at the city of New York, in September, 1865. The complaint counted on the sale and delivery of the goods, and a promise thereon to pay the price.

The defendant answered denying the complaint.

The action was tried before Justice GILBERT and a jury, in October, 1869, and the plaintiffs were nonsuited.

On the trial the following facts appeared :

The firm of Hoppock, Glenn & Co. (the plaintiffs) were merchants doing business in the city of New York.

In the fall of 1864, Chester Moses, the defendant, was carrying on business at Rochester, Minnesota.

Chester Moses resided at Marcellus, Onondaga county, New York, where he was a manufacturer of cloth.

The business in Minnesota was mainly a clothing business, and Curtis H. Moses, the son of the defendant, carried it on as his agent.

In the fall of 1864, Hoppock, Glenn & Co., sold one bill of goods to the defendant (the son, Curtis H., acting as his agent in making the purchase), and they were charged to the defendant and paid for by him.

In the Spring of 1865, April, Hoppock, Glenn & Co. sold a bill of goods to the firm of Moses & Whallon. The goods were charged to them in the copartnership name, were shipped to them in that name, the plaintiffs demanded payment of them. They were paid for by them.

In August of the same year, the plaintiffs sold another bill of goods to the same firm of Moses & Whallon, which was

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charged upon their books and directed and shipped to that firm as before.

Both these bills were paid. They amounted, one bill to \$6,368 04, the amount of the other bill is not stated, the payments were made partly in cash and partly in drafts, indorsed (probably) in the firm name of Moses & Whallon, that being the way in which they usually carried money.

In September thereafter, the bills in controversy were sold and charged, directed and shipped to the same firm.

There is no proof in the case that the defendant was actually a member of the firm of Moses & Whallon, nor is there any pretence that he was so in fact.

The salesman of the plaintiffs' firm, Mr. Comstock (who is one of the firm), states that when he sold these goods he supposed the firm of Moses & Whallon consisted of Chester Moses (the defendant) and Henry P. Whallon, and he sold them upon the responsibility of the firm and of both parties to it.

He further states that Curtis H. Moses, who made the purchase, told him that the defendant was one of the firm of Moses & Whallon. That he supposed the goods were sold to them. That this statement was made to him at the time the first bill of goods was sold and charged to Moses & Whallon.

These declarations are not proved to have been authorized by the defendant.

It further appeared that neither of the plaintiffs had seen the defendant, or knew him personally, or had any correspondence with him, or any communication from him until after the goods had been sold and the firm of Moses & Whallon had failed.

After the failure of the firm, and in January, 1866, one of the plaintiffs (Mr. Glenn) called on the defendant at his residence in Marcellus, and he states on his direct examination that the defendant admitted that his son (Curtis H.) "was his agent for the purpose of buying goods in New

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York." That he went there to see him about this bill of goods, and it was there on that occasion that he admitted this agency.

On his cross-examination, however, he admits that on going there and presenting the bills in question, the defendant declined to pay them, saying he would not pay the bills of Moses & Whallon, but would pay anything his name was to. That thereupon, the witness threatened him with the imprisonment of his son for the misrepresentations he had made, and that he would follow him. "The old gentleman took it very moderately," and told him that he would pay any bills that were sold in his name or charged to him.

After that there was another interview between the defendant and members of the plaintiffs' firm at their counting house in New York. They undertook to state that he then admitted that his son was his agent for buying goods in New York, generally.

On cross-examination, however, he admits that the defendant did deny specifically the son's agency in this transaction.

Mr. Hoppock, another member of the firm, states the same conversation which was held by him with the defendant.

He stated to the defendant the ground on which they considered him liable for the goods, and the reply of the defendant which was, that Curtis H. had been his agent, but was no longer, to which the witness responded, that former bills had been charged to Chester Moses and had been paid, and they "had never known any change."

On his cross-examination he admitted, that his understanding of the conversation was, that he denied positively the agency of his son in buying this bill.

That he also told him, that he had been his agent, but that his agency ceased on the first of January, 1865.

I. There was only a single transaction in which Curtis H. Moses bought goods of the plaintiffs as the defendant's agent; that purchase was in the fall of 1864, and the bill was paid

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This would not be sufficient authority for the plaintiffs afterwards to sell other bills upon the defendant's credit, upon the presumption of a continued agency.

II. But if a single transaction would be sufficient ground for such a presumption, it would be answered by the fact, that the assumed agent made no such representation at the time of the purchase of the bill in suit, nor was any credit given to the defendant alone. On the contrary, the goods were purchased on the credit of the copartnership firm of Moses & Whallon, and after several bills had been sold to and charged and shipped to that firm, and paid for by them, and several months after any transactions between the plaintiffs and the defendant.

III. The credit was given in this case, not upon the representation that the purchaser, (Curtis H. Moses) was the agent of the defendant, but upon the false representation that the defendant was a member of the firm of Moses & Whallon. This was the ground taken by the plaintiffs in demanding payment of the defendant. This excludes the idea that the plaintiffs sold to and can recover of the defendant on the ground that they had no notice of the termination of his agency.

IV. Notice of the fact, that an individual has formed a copartnership, or that additional members have been admitted into a firm, is sufficient to determine the authority of an agent; and to enable him to act after such notice there must be a renewed authorization (*Callanan & Ingham* agt. *Van Vleck and others*, 36 Barb., 324; *Kirby* agt. *Hewett*, 26 Barb., 604).

V. Three facts should be observed.

1st. That the agency proved by the confession of the defendant, was an individual agency, existing prior to the credit given to Moses & Whallon, and terminating on or about January 1st, 1865.

2d. That there is no proof whatever that the defendant

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was one of the partners in the firm of Moses & Whallon, except the false statement of Curtis H. Moses, and

3d. That the sale was made and the credit given to the firm of Moses & Whallon.

There is no principle upon which it can be claimed, that the statement of Curtis H. Moses, that the defendant was the Moses of Moses & Whallon, was or is any proof of the existence of such fact.

An individual agency to buy or sell goods, does not authorize the agent to make his principal a partner, or admit him to be such. He must be produced as a witness, his declarations are inadmissible (3 *Phillip's Evidence, Declarations of Agent*, 381; 7 *Wend.*, 281).

The fact of partnership must be established by legitimate proof, and this followed up by showing the authority of C. H. Moses to buy for that firm; neither is proved.

The fact that the credit was given to the firm of Moses & Whallon, proves notice to plaintiff that C. H. Moses was not acting as the individual agent of the defendant, and no other agency is proved or intimated (*Part 1, Cow. & Hill's, Notes*, 408).

VI. The principle, that "where one of two innocent persons must suffer for the action of a third, he who has enabled such third person to occasion the loss must sustain it," has no application whatever to the facts presented in this case. This principle has been applied to the case where a partner gives the note of the firm for his private benefit, which comes into the hands of a *bona fide* holder before due (*North River Bank agt. Aymar*, 3 *Hill*, 262).

Also to the sale and delivery of goods under false representations, and which come into the possession of a *bona fide* purchaser (*Ash agt. Rutman*, 1 *Hill*, 302).

But no case has made this principle applicable to the acts of an agent—when such act is manifestly outside of the agency proved.

Curtis H. Moses was the individual agent of Chester

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Moses, prior to January 1, 1865, in reference to a clothing store, &c., in Rochester, Minn. That store and that agency closed and ended then.

It would be absurd to hold that the acts and statements of this agent, occurring long after the termination of his agency, when he was openly acting for the firm of Moses & Whallon, could legally bind Chester Moses.

The judgment of the supreme court, affirming the judgment at circuit, should be affirmed by this court.

CHURCH, Ch. J.—The difficulty with the plaintiff's case is, that there was no evidence that the defendant's testator was a member of the firm of Moses & Whallon, to whom they sold the goods in question.

Curtis Moses had previously carried on business as the agent of the defendant's testator, and had, as such agent, purchased goods of the plaintiffs, and if these purchases had been made in the same way and in the name and upon the credit of Chester Moses, without notice that the agency had ceased, the latter would have been bound; but an agency to transact business for an individual is terminated by the formation of a copartnership (*Callanan agt. Van Vleck*, 36 Barb., 324; *Kirby agt. Hewitt*, 26 Barb., 607; *Palmer agt. Stevens*, 1 Denio, 471). The only agency in this case was an individual agency by Chester Moses to Curtis Moses, to purchase goods and carry on business in his individual name. These goods were purchased in the name of Moses & Whallon, and the plaintiffs were, therefore, bound to take notice of the termination of the agency of Curtis Moses, and that a new authorization was necessary to enable him to purchase property on the credit of the firm. The plaintiffs claim, that the defendant's testator was a member of the firm of Moses & Whallon, but the only evidence of this was that Curtis Moses said so.

He had no more authority by acts, or declarations in behalf of Moses & Whallon, to bind Chester Moses, by virtue of his

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former agency, than he had to take in a partner without the consent of Chester Moses. He had no authority from the latter to purchase goods in the name of the firm, and his doing so, was an assumption of authority of which the plaintiffs had legal notice by the manner of doing the business.

The declarations of one member of a firm, are not evidence to prove a partnership against another member, nor can the declarations of an individual agent of one member be used for that purpose against either. I have carefully examined the authorities cited by the counsel for the appellants, and all of them are clearly distinguished from this, and none of them would justify a recovery in this case.

The judgment must be affirmed, with costs.

Egerton agt. Fulton Nat Bank.

SUPERIOR COURT.

WILLIAM C. EGERTON agt. THE FULTON NATIONAL BANK.

A bank is not authorized to pay a note of its depositor, made payable at the bank, and charge him with the amount thereof where the depositor, before the maturity of the note, has notified the bank not to pay it.
The relation of a bank with its depositors considered.

Special term.

ACTION tried at the trial term without a jury, January, 1872.

GEORGE W. VAN SLYCK, *for plaintiff.*GEORGE W. WRIGHT, *for defendant.*

This is an action to recover the sum of two hundred and forty-four dollars and ninety cents, claimed to be due and owing by the defendants to the plaintiff.

For several years prior to September, 1871, the plaintiff had been a depositor in the defendant's bank. In June, 1869, the plaintiff made and delivered his promissory note for the above mentioned sum, payable in sixty days to the order of T. McManus, at the defendant's bank. Before the maturity of the note, the plaintiff notified the bank not to pay or accept it. Notwithstanding such notice, the bank did pay the amount of the note to the holder, and charged the plaintiff with the amount, and subsequently delivered the note to the plaintiff as a voucher for such payment.

The plaintiff denied the right of the bank to pay after the notice, and demanded the amount of the bank.

The note was not returned nor offered to be returned to

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the bank ; but was merely produced by the plaintiff on the trial, ready to be delivered to the defendant.

MONELL, J.—The plaintiff having made his promissory note payable at the defendant's bank, it may be treated as an inland bill of exchange drawn against a general fund. It did not, however, appropriate the fund, or confer any right to it, on the holder of the note ; and the bank could refuse to pay, without incurring any liability to the holder.

The relation between a bank and its depositor is that of debtor and creditor, and not of bailee and bailor. The bank has the absolute and legal title, and is liable only in the character of an ordinary debtor (*Com. Bk. of Albany* agt. *Hughes*, 17 *Wend.*, 94 ; *Matter of Franklin Bk.*, 1 *Paige*, 249 ; *Chapman* agt. *White*, 6 *N. Y.*, 412 ; *Graves* agt. *Dudley*, 20 *N. Y.*, 80 ; *Dykers* agt. *Leather Manf. Bk.*, 11 *Paige*, 612 ; *Lent* agt. *Bk. of N. A.*, 49 *Barb.*, 221).

The drawer of a bill has a right to stop its payment ; and after notice to the drawee not to pay, the latter will pay at his peril ; and it cannot, I think, be claimed, that the effect of the notice is merely to make the payment subject to any defenses of the drawer in the hands of the holder ; or a bill so paid a valid security in the hands of the drawee.

In this case, the bank is to be regarded as the drawee of a bill, having funds of the drawer, against which it is drawn, and in that sense, the agent of the drawer. The revocation of the direction to pay, was therefore, for the protection of the fund, against its appropriation to a supposed improper purpose, and to prevent such appropriation, to the injury of the drawer, as if the note had been stolen or obtained through fraud.

In one aspect, however, it may be claimed that, notwithstanding the notice not to pay, the bank by paying to the holder the face of the note became a purchaser for a sufficient consideration, and therefore, as holder took the note subject only to any defenses of the maker against any of

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the parties to it. In that view, if the note was valid in the hands of the party to whom it was paid by the bank, it would be equally valid in the hands of the latter.

But the transaction was not a purchase.

On presentation the note was paid and the amount charged to the plaintiff. It was then returned to him as a voucher of the payment.

No claim was made that it was, in fact or in effect, a purchase. It was paid by mistake, and in forgetfulness of the direction not to pay, and no demand was made by the bank for its return. It is not set up in the answer, either as a set-off or counterclaim; but the whole defense rests upon an allegation of a payment, upon the order of the plaintiff of his entire deposit; and the note is averred to be a portion of such payment.

In dealings between a depositor and a bank, whatever may be their legal relation, they act substantially upon the principal of agency. Having received the funds of the depositor, they pay his drafts, and they are bound, as I think, to obey all his directions for the disposal of his funds. They cannot, it seems to me, disobey his orders, either wilfully or innocently, and then claim a new and different relation, with rights inconsistent with such as before existed.

In paying a draft after payment has been stopped, a bank cannot be protected, without an essential change in the accustomed and commonly understood duty which it owes to its depositor, or a total disregard of its obligations to him.

These views are in accordance with the cases of *Schneider* agt. *Irving Bank* (1 *Daly*, 500); and *Lent* agt. *Bk. of N. A.*, (49 *Barb.*, 221).

I am, therefore, of the opinion that under the circumstances, the defendant was not authorized to charge the plaintiff with the amount of the note in question, and that the payment of it by the bank is not available as a defense to this action.

The plaintiff must have judgment.

Mudge agt. Gilbert.

SUPREME COURT.

BYRON MUDGE agt. WILLIAM GILBERT.

On an examination of a party as a witness under sections 390 and 391 of the Code, before a county judge, the judge has the power to compel the party to answer any and all questions which the judge shall determine relate to the issues raised by the pleadings in the action.

Where the defendant is examined he may be compelled to answer questions relating to the defense interposed by him, and not pertinent to the affirmative claim made in the plaintiff's complaint, as well as to such facts as are essential to enable the plaintiff to make out his case as alleged in the complaint.

Onondaga Special Term, Syracuse, May, 1872.

THE plaintiff obtained a summons for the examination of the defendant before the county judge of Onondaga county, pursuant to sections 390 and 391 of the Code, and while pursuing such examination, certain questions were asked on behalf of the plaintiff relating to the defense interposed by the defendant, and not pertinent to the affirmative claim made in the plaintiff's complaint against the defendant.

The defendant objected, claiming that the plaintiff could only ask for such facts as were essential to enable him to make out his case as charged in the complaint, and that he had no right to ask any question which related solely to the defense of the defendant.

By consent of counsel the question was submitted to the court for decision.

ARTHUR HOLMES, *for plaintiff.*

IRVING G. VANN, *for defendant.*

HARDIN, J.—Prior to the adoption of the Code in 1848, bills of discovery were allowed to obtain evidence in aid of

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actions at law (*Lansing* agt. *Starr*, 2 *Johns. Ch.*, 150; *Deas* agt. *Harvey*, 2 *Barb. Ch.*, 448; *Lane* agt. *Stebbins*, 9 *Paige*, 622).

This practice was abolished and prohibited by section 389 of the Code; and by section 388 the method provided for searching documentary evidence was provided.

Section 390 provides that, "a party to an action may be examined as a witness * * * and subject to the same rules of examination as any other witness to testify either at the trial, or conditionally, or upon commission;" and by section 392, it is provided that the examination "may be read by either party on the trial."

I think the important question before the court, if the party is examined in court, or before the judge, if examined out of court, is as to the materiality of the proposed evidence. If the proposed evidence relates to any of the issues raised by the pleadings, then, I am of the opinion, that it is the duty of the court to receive the evidence, (subject to its discretion as to the order), and if the examination is before a judge, then it is his duty only to determine whether the proposed evidence relates to any of the material issues involved in the action.

By reference to *Bell* agt. *Richmond*, (50 *Barb.*, 571), it will be observed that it has been held by the general term in the third district, that a party cannot be examined under these sections, before issue is joined; and in the opinion given in that case, it was remarked "that witnesses are always to be examined on matters pertinent to the issue."

This last case is in accordance with *Cook* agt. *Bidwell*, (29 *How.*, 483), in which the court say that, "the examination cannot be had except in an action after issue, and as to matters pertinent to the issue" (*Same Case*, 17 *Abb.*, 300).

That the party is to appear and testify, and be subjected to the same rules of examination as any other witness has been adjudged so often, that it is not now an open question. As early as *Bonesteel* agt. *Lynde*, (8 *How.*, 226, 233), Judge

Mudge agt. Gilbert.

WELLS, said of section 390, that it, "in terms, declares that he may be compelled to testify the same as any other witness."

"To testify is to give evidence, and the reasonable and just interpretation of the word requires that he give evidence in the same manner as other witnesses are bound to do." This opinion was affirmed at general term in 8 *How.*, 352. And in giving effect to a party's testimony, the same rules apply as to any other witness (See opinion of BARCULO, J., in *Roberts* agt. *Gee*, 15 *Barb.*, 450).

The question presented relates to the power of the county judge to compel the defendant to answer questions which relate confessedly to the issues involved, and I have no doubt but the power is vested, and that it will be properly exercised in this case, and that it is the duty of the defendant to answer any and all questions which the county judge shall determine relate to the issues raised by the pleadings in this action (16 *Abb.*, 188; 32 *N. Y.*, 127).

I see no errors in the rulings of the county judge, and the witness will, therefore, be recalled, and the examination may continue.

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SUPREME COURT.

PHILIP HACKFORD, administrator, &c., agt. THE NEW YORK
CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

In an action against a railroad company for causing death from negligence; it appeared from the plaintiff's testimony, that the day was very stormy—wind high, blowing hard and snow falling very fast, which made it difficult to see a train of cars at the place where the highway crossed the railroad, more than six or eight rods distant; that just before the deceased attempted to cross the track with his horses and wagon, a carman with a load crossed the track, and there were other terms approaching the track behind that of the deceased.

The drivers of other teams stopped, seeing the approaching engine, and cried "whoa" to the deceased just before he got on the track; the deceased did not regard it but drove on and was instantly struck and killed.

The witnesses testified that as the engine was approaching the track the bell was not rung nor was the whistle blown; the train was running at the speed of about 20 miles an hour, and there was no sign indicating the crossing. The railroad track was higher than the land on either side, and higher than the highway. Near the crossing (in fair weather) a train could be seen for a distance of 1400 feet, in one direction, and an eighth of a mile in the other.

The plaintiff was *non-suited* at the circuit, on the ground that the deceased was himself guilty of negligence:

Held, by the general term, on appeal, that the court committed an error in refusing to submit the question of concurring negligence of the deceased to the jury. Had the day been a fair one so that there was nothing to prevent a person from seeing and hearing an approaching train, the deceased would have been chargeable with the grossest negligence.

On a trial of this kind, the plaintiff is not bound to disprove *affirmatively* his own negligence. But where on the trial there is evidence of negligence on the part of the plaintiff, whether it comes from plaintiff's or defendants' witnesses, the plaintiff must overcome it, in order to entitle himself to recover. In this way, and in this way only is the plaintiff bound to disprove his own negligence.

Fourth Department, General Term.

Submitted, September Term, 1871.

Decided, November Term, 1871.

Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.

APPEAL from a judgment of nonsuit at the circuit.

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LYMAN & JAMES, *for plaintiff.*

This action was commenced in 1870, under the statute to recover damages for the injury caused the decedent by the defendant, December 18th, 1869, at the Genesee street crossing in the village of Geddes, Onondaga county, from which he died December 19th, 1869.

The cause came on to be tried at a circuit held at Syracuse, February 27, 1871, before Hon. HENRY A. FOSTER, Justice, and a jury.

At the close of the plaintiff's testimony and on motion of counsel for the defendant the court nonsuited the plaintiff; to which ruling plaintiff's counsel duly excepted, thereupon the court directed an order to be entered herein that plaintiff have sixty days to make and serve case and exceptions, and that defendant have the same time to prepare and serve amendments thereto, and in the mean time all proceedings to be stayed and the case heard in the first instance at general term.

Decedent lived about fifteen miles from Syracuse, was forty-four years old, a native of England; and had been in this country about three years, and was a farmer; had a wife, two brothers, no children, was in good health, a sober man, and the injury occurred to decedent December 18, 1869, at Genesee street crossing, about one mile and a half west of Syracuse; decedent resided south of the railroad, and in going to Syracuse would pass south of the railroad until he reached Geddes; he left Syracuse for home on the afternoon of December 18, 1869, and had a team and wagon, he approached the crossing on a walk; there were three teams at the crossing at the time, one was stopped and the other passed by Hackford on to the railroad ahead of him, the man who passed him at the railroad says he did so on a walk; was about ten feet ahead of decedent when he went on to the track, and passed him on the right, and was four or five feet from the east track on which the train was running

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when decedent was struck, no bell was rung on the locomotive or whistle blown; the sign board which had been erected and kept up there for a great many years, was down, and was replaced immediately after the accident; no flagman there, it had been snowing some all day; at the time of the accident a terrible snow storm prevailed, and it was impossible to see but a short distance; the railroad crossing was covered with three or four inches of fresh snow, and the snow on the track caused the train to run quite still.

There is no evidence to show that decedent ever crossed the railroad at this point before, and the most usual and direct route from his place of residence to the city of Syracuse was, by way of Onondaga Hill, and his neighbor, Mr. Woodford, who was in the city on the day of the accident, came and returned by the latter route; the train was going west, leaving the city; was running at the rate of twenty miles an hour; Genesee street is a main road leading to the city, and upon which there is a very large amount of travel; three railroad tracks cross the street at this point, the direct road to Rochester and the Syracuse and Oswego road; the railroad approaches the street at this point at an acute angle of about three degrees; trains are passing this point very often; the train struck decedent's horses; threw him out of his wagon through the fence, his head striking a board close to a post breaking it off, causing injuries from which he died December 19, 1869.

The exceptions are:

1st. The offer by the plaintiff to show by the witness Allen, the number of accidents he had known at that crossing since he had lived in Geddes.

2d. The offer on the part of plaintiff's counsel to show by Mr. Smith, the village clerk of Geddes. that there was a by-law of that village passed by the board of trustees, prohibiting trains running through that village faster than ten miles an hour, and that notice thereof had been served on the defendant.

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3d. Plaintiff's counsel excepts to the decision of the court nonsuiting the plaintiff.

4th. Plaintiff's counsel excepts to the refusal of the court to allow the case to go to the jury.

I. The evidence offered as to the number of accidents at this crossing was competent and should have been admitted.

First. It was admissible as tending to show that place to be a dangerous crossing, and the necessity of great precautions being taken by the defendant.

Second. It was competent evidence bearing on the question of negligence as involved in this case. Suppose that the plaintiff had been able to show that one person on an average was killed there by the defendant daily, or that one hundred accidents involving the destruction of life and property, had happened at that point within one week, would not such proof have been competent as tending to show these two propositions:

1st. That this accident was caused by defendant's negligence.

2d. That it was not caused by the negligence of deceased. Of course, the evidence would not be conclusive on either point, but we submit it had a bearing upon both, and the plaintiff should have been allowed to show all he could on this point to go in with the other facts of the case, and to be considered with them.

II. The evidence offered to show that there was a by-law of the village of Geddes prohibiting trains running through that place faster than ten miles an hour, and that notice thereof had been served on the defendant, was competent and should have been allowed. The court excluded the evidence on the ground that it was immaterial.

First Here is a distinct offer to show that the defendant deliberately violated a village ordinance duly passed by a body having authority. The court decided it on the ground that it was immaterial, and not on the ground that it was passed without authority. It is material. We are aware

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that the contrary doctrine was held in the case of *Brown* agt. *State Line R.R. Co.* (22 N. Y., 191), but by a divided court, DENIO, SELDON and CLERKE, *JJ.*, dissenting. The doctrine of that case has been severely criticised in this state (*Jetter* agt. *N. Y. & H. R.R. Co.*, 2 *Keyes*, 154, 162; *Williams* agt. *O'Keefe*, 9 *Bosw.*, 536; *Schu. & Red. on Neg.*, § 484, 10 *Cush.* 562; 2 *Cush.*, 539), and is not followed in any other state.

Second. Why was it material?

1st. Because negligence and what constitutes negligence is to be judged from, and viewed in the light of, all the surrounding circumstances of each particular case.

2d. The act of the defendant in deliberately violating a village ordinance, passed for the protection of the traveler, of which it had due notice, entered into and constituted a part of the negligence of the defendant.

3d. The plaintiff must show wherein and in what that negligence consisted.

Third. The defendant is bound in law to observe the laws and regulations passed by the proper authorities for the protection of the traveler, regulating the manner and speed of running his trains.

1st. Defendant's disregarding the village ordinance passed to regulate the speed of trains and for the safety of the passenger, was one of the elements constituting defendant's negligence, and was a part of the evidence by which plaintiff attempted to show the degree of negligence and in what it consisted; and that the railroad company wilfully and negligently disregarded a duty it was bound to perform. But says the court, "I do not think a by-law of a village could make it negligence *per se* against the railroad company, especially in favor of a person who was not a resident of the village, but only a traveler through there." Granted. But if it did not make it negligence "*per se*," was it not one of the facts of the case bearing upon the question of negligence?

It is not necessary, to the admission of evidence, that each

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distinct fact offered to be shown should show negligence "*per se*."

It is not in truth necessary, that all the facts put together should show presumptive negligence; all the plaintiff is required to show is a *prima facie* case of negligence on the part of the defendant, and an omission to perform a duty imposed by statute is *prima facie* negligence (*St. Louis, J. & C. R.R. Co. agt. Terhune*, 50 Ill., 151).

2d. Nor is a by-law passed by the village authorities for the protection of persons alone residing within its boundaries, but it is for the protection of the public at large, and applies to all alike. Suppose a person should come into the state from Pennsylvania, and should receive an injury at a railroad crossing under like circumstance attending that of Hackford, and bringing an action against the company for the injuries received, his counsel should attempt to show failure on the part of the defendant to comply with the statutory regulations as to ringing the bell and blowing the whistle, and defendant's counsel should raise an objection to this evidence, could it be said, that because the plaintiff was not a resident of this state, the statute did not apply to him? that as to him he had no rights under the statute which the company was bound to respect? and that the objection must be sustained? If the former is a good objection, why would not the latter be equally as valid?

3d. The third exception taken by the plaintiff is to the ruling of the court nonsuiting the plaintiff.

The motion for a nonsuit was made at the close of the plaintiff's testimony. The motion for nonsuit was grounded on the assumption of the fact that there was not sufficient evidence to go to the jury.

The first question that arises upon this exception is the sufficiency of the evidence.

First. It is conceded on the trial of this cause that the decedent died from the effects of the injury inflicted by the defendant.

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We have given : (1.) injury ; (2.) state of facts attending the injury ; (3.) death, and to be deduced from this, is the evidence sufficient to go to the jury.

1st. The court says, "It seems to me there is not sufficient evidence to go to the jury.

(a.) The court in passing upon the sufficiency of the evidence directly invaded the province of the jury. It is an elementary principle of law that whether there is any evidence is a question for the judge, but whether there is sufficient evidence is a question for the jury (*Phillips on Evi.*, 3d Am. Ed., 15 marg. pag. ; *Phillips on Evi.*, 4th Am. Ed., by Edwards, p. 3 ; *Wells agt. Tucker*, 3 *Binney*, 370-2-3.)

(b.) Sufficiency cannot in the nature of things be subject to legal definite control (*Betts agt. Jackson*, 6 *Wend.*, 204 ; 1 *Stark, Ev.*, 399).

When the court takes upon itself the right to pass upon the sufficiency of the evidence, it assumes a dangerous prerogative and directly invades the province of the jury. If courts are to decide upon the sufficiency of the evidence, of what use is a jury ? how and in what way are a person's rights to be determined by a trial before his peers.

Second. The evidence in this case is to be viewed most favorably to the decedent, and the defendant must concede every fact which has been proved against him, and upon appeal the plaintiff is entitled to have every doubtful fact found in his favor (*Colgrove agt. N. Y. & N. H. & H. R.R. Cos.* 20 *N. Y.*, 494 ; *Church agt. N. Y. Cen. R.R. Co.*, 3 *Trans. Cas.* ; *Hart agt. Erie R.R. Co.*, 3 *Albany L. J.*, 312).

1st. In determining the propriety of a nonsuit, we are legally bound to assume the truth of the facts which the testimony of the plaintiff legitimately conducted to prove (*Ernst agt. H. R.R. Co.*, 25 *N. Y.*, 25 ; *S. C.*, HUNT, *J.*, 42 ; 20 *N. Y.* 492 ; 3 *Barb.*, 110).

2d. When the evidence is conflicting or questions of credibility are involved, the case must be very clear indeed, in favor of the defendant to justify the court in taking the cause

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away from the jury (*Hart agt. Erie R.R. Co.*, 3 *Alb. L. J.*, 312).

3d. Even where there is no conflict of evidence, it does not follow, necessarily, that the court is to decide the issue (*Ernst agt. H. R. R. Co.* 35 *N. Y.*, 47; *Ireland agt. Os. R.R. Co.*, 13 *N. Y.*, 533; *Oldfield agt. N. Y. & H. R.R. Co.*, 14 *N. Y.*, 310).

(a.) Negligence is generally deduced from different circumstances attending the injury and more or less definitely proved and clearly established, and seldom susceptible of positive proof that decedent was free from contributory negligence. The same principle may be applied to this as in case of a demurrer to evidence, and then any inference against the demurrant which the jury might, with the slightest degree of propriety, make from the evidence is to be conceded (*Cow. & Hill's notes, part 2, 3d ed.*, 785; *Colgrove agt. N. H. & H. R.R. Co.*, 20 *N. Y.*, 492; *Betts agt. Jackson*, 6 *Wend.*, 203).

IV. The fourth exception is to the refusal of the court to allow the case to go to the jury.

First. The question touching the negligence of the defendant was one clearly of fact for the jury. The defendant, through different and independent agencies, was guilty of negligence; (1.) in not ringing the bell or blowing the whistle as prescribed by the statute; (2.) neglecting the customary sign or signal, "railroad crossing, look out for the cars;" (3.) running at a dangerous rate of speed without signals of its approach.

1st. As to the signals by bell or whistle. The duty of the railroad company as to ringing the bell and blowing the whistle at places where the same shall cross any traveled public road is prescribed by statute (2 *R. S.*, 5th ed. 688, § 50).

(a.) The object of the statute was protection to the traveler using the highway (*Ernst agt. Hudson R.R. Co.*, 35 *N. Y.*, 28; *Hart agt. Erie R.R. Co.*, 3 *Alb. L. J.*, 312; 3 *Kerr*, 82; 32 *Barb.*, 163).

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(b.) As between the traveler using the public highway and the railroad company, the former has the right to rely on the latter performing the act prescribed by statute; and it is not carelessness in him to assume that the company will obey the positive mandates of the law (29 N. Y. 387; 35 N. Y., 28 35, 48; *Hart agt. Erie R.R. Co.*, 3 Alb. L. J., 314; *Jetter agt. N. Y. C. R.R. Co.*, 2 Keyes, 154).

2d. Omitting the customary sign, "railroad crossing, look out for the cars." It was proved on the trial of this cause that, for a great many years, the defendant had kept up a signboard at this crossing, as prescribed by the statute, and that it was not up at the time of the accident. It was claimed by defendant's counsel, on the trial, that the law did not require the company to erect and maintain a signboard at this crossing; yet it is shown that the defendant, on the Monday following the accident, replaced the signboard that was down.

(a.) This high measure of duty on the part of the railroad company, the statute prescribing notices by signboards at road or street crossings, * * has not relaxed in any degree. As a rule of duty, it stands as inflexible, founded in common law and the plainest right as if there were no such statute (*Grippin agt. N. Y. C. R.R.*, 40 N. Y., 42).

(b.) Even if there was no law or regulation requiring the defendant to keep and maintain a signboard erected at this crossing, the company, by keeping one erected there for many years, had made a law unto themselves and were as much bound to observe that law as if it were a statutory mandate, and omitting to do so was negligence (*Ernst agt. Hudson R. R.R. Co.*, 39 N. Y., 67.)

3d. The train approached the crossing at a rapid rate of speed and without any signals of any kind.

The omission of the customary signals was an assurance, by the company to the decedent, that no train was approaching within a quarter of a mile of the crossing. On that he was entitled to rely, and to the defendant he owed no further

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duty. He was not bound to be on the lookout for danger when assured by the company that the crossing was safe (*Beisiegel* agt. *N. Y. C. R.R. Co.*, 34 *N. Y.*, 622; *Hart* agt. *Erie R.R. Co.*, 3 *Alb. L. J.*, 314; *Phil. & Trent R.R. Co.* agt. *Hogan et al.*, 47 *Penn.*, 244; *Great West. R.R. Co.* agt. *Geddis*, 33 *Ill.*, 304; 35 *N. Y.*, 35; 2 *Keyes*, 154).

(a.) The evidence shows gross culpable negligence on the part of the railroad company. It had omitted in every particular to give warning of the approaching train; had openly violated the statute made to warn the traveler of approaching danger, and, as against a wrongdoer who openly defies a public statute passed for the protection of human life, nothing short of culpable negligence, on the part of the decedent, which contributed to the injury, will debar his widow and next of kin from a right to recover (22 *N. Y.* 215; 1 *Denio*, 100; 35 *N. Y.*, 26, 35, 36; *Hart* agt. *Erie R.R. Co.*, 3 *Alb. L. J.*, 312).

Second. What is the rule of law governing this class of cases?

1st. In determining whether the failure of the decedent to discover the approaching train, is attributable to his carelessness, we must take into consideration all the circumstances surrounding the transaction. An act or omission under which one state of facts would be clearly negligent, under other circumstances would be excusable, and no rule of universal application can be prescribed, as every case must mainly depend upon its own circumstances and be determined accordingly (*Hart* agt. *Erie R.R. Co.*, 3 *Alb. L. J.*, 314; *Ernst* agt. *Erie R.R. Co.*, 39 *N. Y.*, 65; *North Pa. R.R. Co.* agt. *Hilman*, 49 *Pa.* 60; *Fordham* agt. *Brighton R.R. Co.*, 4 *Law R.*, 617, *Court Com. Pleas*, decided June, 1869.

2d. The want of caution which constitutes negligence must in any given case depend upon the circumstances under which the plaintiff was placed at the time (*Beisiegel* agt. *N. Y. C. R.R.*, 30 *N. Y.*, 625).

3d. The reasonable care and prudence required of the

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parties, is governed by time, place and circumstances of danger (*Grippen* agt. N. Y. C. R.R., 40 N. Y., 42).

4th. That mere negligence on his part will not defeat the plaintiff's right to recover unless it be such that but for that negligence the misfortune could not have happened, or if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff (*Tuff* agt. *Warman*, 5 C. B. N. S. App., 585; 27 L. J., (C. P.,) 322; *Fordham* agt. *Brighton R.R. Co.*, *supra*; 49 Ill., 572).

(a.) It is an elementary principle of law that what constitutes negligence is a pure question of fact for the jury to decide (*Ang. on Car.*, § 7, 16, &c.; *Story on Bail.*, § 11; *Greenleaf on Ev.*, § 48; 35 N. Y., 46, HUNT, J.)

1st. Upon an examination of all the cases bearing upon the subject, no rule of law can be deduced applicable to all cases of negligence and legally defining what under all circumstances shall constitute negligence in any given case.

(a.) The rule laid down in *Havens* agt. *Erie R.R. Co.*, (41 N. Y., 296), decided at the December term, 1869, was by a divided court, HUNT, Ch. J., and LOTT, J., dissenting, and WOODRUFF, J., taking no part. The case of *Beisiegel* agt. N. Y. C. R.R. Co., 40 N. Y., 9), decided March term, 1869, was by a divided court; MURRAY and DANIELS, JJ., for reversal, on the ground stated in the opinion of GROVER, J.; WOODRUFF, J., for reversal, on the ground stated in his opinion in *Grippen Case*, (*Id.*); JAMES, J., on the ground that defendant's carelessness and negligence contributed to the injury; HUNT, Ch. J., and MASON, J., for affirmance; LOTT, J., not voting. In the case of *Grippen* agt. N. Y. C. R.R. (40 N. Y., 35), was by a divided court; GROVER, JAMES and DANIELS, JJ., for reversal, on the ground stated in the opinion of WOODRUFF, J.; MASON and MURRAY, JJ., on the ground of error stated in the charge as to ringing the bell; HUNT, Ch. J., for affirmance; LOTT, J., not voting. The case of *Gonzales* agt. N. Y. & H. R.R. (38 N. Y., 440),

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has been expressly overruled by the same court when again before the court of appeals (39 *How.*, 407). The case of *Ernst* agt. *Hudson R. R.R. Co.* (24 *How.*, 97), the doctrine of "taking the precaution of looking both ways upon the track," was first distinctly enunciated, but by a divided court; SUTHERLAND, *J.*, writing a dissenting opinion which is reported in 32 *How.*, 265. That case has been reversed in 35 *N. Y.*, 9; 39 *N. Y.*, 61, and the plaintiff recovered. The case of *Steves* agt. *O. & S. R.R. Co.*, (18 *N. Y.*, 422), was by a divided court; DENIO, SELDEN and PRATT, *JJ.*, dissented, holding that the object of the statute requiring the ringing the bell, or sounding the whistle, was to put persons negligently approaching a crossing upon their guard; and that the question whether the negligence of plaintiff was such if the proper signals had been given he would still have been injured, was one which should have been left to the jury.

(b.) Judge FOSTER, in the case of *Gonzales* agt. *H. R. R. Co.*, (39 *How.*, 412), in commenting upon the opinion of the court, when the same case was first before it for consideration, says: But if the court intended, under any and all circumstances, it was such negligence for a person to cross a railroad track without taking the precaution to look up and down the track, the holding is in conflict with several decisions of this court. * * * I do not think the court intended to lay down any such rule; and at page 423, same case continues: The much vexed case of *Ernst* agt. *H. R. R.R. Co.* (39 *N. Y.*, 61), seems to have decided, in a case between the railroad and a stranger attempting to cross the road, that no inferences of fact are to be entertained against him as a matter of law by this court—that this court could not assume as a matter of law that he did not look.

(c.) The last case in the court of appeals, involving this question, is that of *Hart* agt. *Erie R.R. Co.*, reported in the *Alb. L. J.*, Vol. 3, 312), and decided at the March term, 1870. That case on a review of all the authorities lays down the law applicable to this case as hereinafter stated. And in

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the case of *Baxter* agt. *Troy & Boston R.R. Co.*, recently decided in the court of appeals and not reported, it affirmatively appeared that the plaintiff did not look for the train. Judge GROVER, in the case says: "All that the law requires is a reasonable use of the senses."

(d.) The doctrine, as enunciated by E. DARWIN SMITH, J., in 24 *How.*, 97, and sought to be established in kindred cases of this nature, is in conflict with many cases in this state, and is virtually overruled in the case of *Hart* agt. *Erie R.R. Co.*, (*supra*), and the latter case has so explained and modified the case of *Wilcox* agt. *R. W. & Og. R.R. Co.*, (39 *N. Y.*, 358), that it cannot be said that the last case can be applied to the one at bar.

2d. The doctrine in *Ernst* agt. *Hudson R. R.R. Co.*, (24 *How.*, 97), is in conflict with the decisions of this country and of England, and should not be followed (*Hart* agt. *Erie R.R. Co.*, 3 *Alb. L. J.*, 312; *Ernst* agt. *Hudson R. R.R. Co.*, 35 *N. Y.*, 20, 27; 39 *N. Y.*, 64-5; *Renwick* agt. *N. Y. C. R.R. Co.*, 36 *N. Y.*, 192; *Mackay* agt. *N. Y. C. R.R. Co.*, 35 *N. Y.*, 75; *Colgrove* agt. *N. H. & H. R.R. Co's.*, 20 *N. Y.*, 492; *Keller* agt. *N. Y. C. R.R. Co.*, 26 *How.*, 177; *Brown* agt. *N. Y. C. R.R. Co.*, 34 *N. Y.*, 40; *Cook* agt. *N. Y. C. R.R. Co.*, 3 *Trans. Appls. Cases*, 8; *S. C.*, 3 *Keyes*, 479; *Mullory* agt. *Tioga R.R. Co.*, 1 *Trans. Appls. Cases*, 206; *Dunham* agt. *Troy U. R.R. Co.*, 3 *Trans. Appls. Cases*, 67; *Sher. & Redfield on Negligence*, 23. § 25; *Walkiel* agt. *Sixth Av. R.R. Co.*, 5 *Trans. Appls. Cases* 217; *North Pa. R. Co.* agt. *Hilman*, 49 *Pa.*, 60; *Penn. R.R. Co.* agt. *Ogier*, 35 *Pa.*, 60, 72; *Isbell* agt. *N. Y. & N. H. R.R.*, 27 *Conn.*, 393; *Beers* agt. *H. R. R.*, 19 *Conn.*, 566; *Park* agt. *O'Brien*, 23. *Conn.*, 347; *Briggs* agt. *Taylor*, 28 *Vt.*, 183; *Vinton* agt. *Schwab*, 32 *Vt.*, 612; *Langhoff* agt. *Mil. & P. Du. L. R.*, 19 *Wis.*, 497; *G. W. R. Co.* agt. *Geddis*, 33 *Ill.*, 304; *C. & A. R.R. Co.* agt. *Grelzner*, 46 *Ill.*, 75; *New Jersey Ex. Co.* agt. *Nichols*, 33 *N. J.*, 439; *Balt. & Ohio R.R. Co.*, agt. *Tranier*, 33 *Mary.*, 542; *North. Cent. R.R. Co.* agt.

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Price, 29 *Mary.*, 421; 18 *Ga.*, 686; 13 *Ga.*, 87; 17 *Ga.*, 593; *Bradley* agt. *B. & M. R.R. Co.*, 2 *Cush.* 540; *Linfield* agt. *Old C. R.R.*, 10 *Cush.*, 562; *Stapely* agt. *The London & S. C. R. W. Co.*, 1 *Law Rep. Court of Ex.*, 211; *Stubley* agt. *London & N. W. R.R. Co.*, 13, *same vol.*; *Bilbee* agt. *The Lond. B. & South Coast R.R. Co.*, 18 *Com. B. R.*; *N. S.*, 583; *Fordham* agt. *Brighton R.R. Co.*, 4 *Law Rep.* 617, *Ct. Com. Pls.*, decided *June Term*, 1869).

3d. In the light of all the cases which we have been able to consult upon this question, we think the court of appeals, in the case of *Hart* agt. *The Erie R.R. Co.*, (*supra*), has deduced rules sufficiently stringent as against the decedent, applicable to this class of cases.

The court therein say :

1st. A traveler on a public thoroughfare crossing a railroad has a right, on approaching a crossing, to expect that the usual warning by bell, whistle or flagman will be given of the approach of a train.

2d. He is not bound to assume that the railroad company will violate the law by omitting such precaution. He has a perfect right to rely upon the assumption that they will obey the law, in determining the degree of caution which he should exercise in approaching the crossing.

3d. While the doctrine of concurring negligence should be recognized and fairly expressed by the courts by requiring persons traveling upon the public highway, in approaching a railroad crossing, to reasonably exercise the senses of hearing and seeing, they should not, in a case where there is a failure on the part of the railroad company to give the warning which the law requires, and when there is no positive proof of omission of duty on the part of the person injured, indulge inferences unfavorable to such person.

4th. In determining whether the failure of the deceased to discover an approaching train is attributable to his own carelessness, we must take into account all the circumstances which surrounded the transaction. Hence, no rule of

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universal application can be prescribed, as every case must mainly depend upon its own circumstances and be determined accordingly.

Third. Testing the case at bar by the rules above stated, and in the light of cases cited, *supra*, to what conclusions do we arrive?

1st. The party against whom a nonsuit is granted is, upon appeal, entitled to have the case construed in the most favorable light possible under the evidence.

2d. The deceased had a right to assume that the railroad company would obey the law. If he was deceived by the unlawful omission of the signals and the accustomed sign, the wrong is not his but theirs (PORTER, 35 N. Y., 35; *Hart agt. Erie R.R. Co., supra*)

3d. Where there is such failure on the part of the defendant to give the warnings required by law, there must be positive proof of omission of duty on the part of the person injured, or contributory negligence is not shown.

4th. The court cannot assume negligence on the part of the deceased unless the evidence, in its most favorable aspect to the plaintiff, shows it.

1. In the case at bar the court assumes two things on granting the motion for nonsuit. (1.) That the deceased knew there was a railroad crossing at the place of the accident, and, (2.) That deceased could have seen the train in time to have avoided the accident, if he had looked.

In regard to the first assumption, we say:

(1.) The law in reference to looking up and down the track can only apply to those cases where the deceased knew there was a track to look up and down. This is too plain a statement to need argument. (2.) The evidence on this point was that deceased lived fifteen miles away; was a foreigner; had been in this country but three years, and his nearest way to Syracuse was another route.

His neighbor, Woodford, came and went the other way. There was no evidence that deceased had ever before been:

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or from Syracuse that way. Under this state of facts, had the court the right to assume as matter of law that the deceased knew there was a railroad crossing at that point? Was it not peculiarly within the province of the jury to pass on that question under the evidence as presented? Bear in mind, also, in this case the court, according to his own statement, assumes it not as a fact established on clear evidence, but on "strong probabilities."

We know no better reply to this than Judge FOSTER's own words in the case of *Gonzales*, (*supra*, 39 *How.*, 418 and 419): "It is the exclusive province of the jury to determine what are the inferences of fact to be deduced from the testimony, to the same extent that it is to decide the facts when the evidence is conflicting." and see cases there cited.

(2.) In regard to the second assumption, in addition to what is said on the other branch of the subject, we say:

1st. The fact that a person just out of a house, with eyes and ears open and free from snow and ice, could see a train six to eight rods, is no evidence that one who had driven two or three miles in a storm, wind blowing, snow driving, and whose face, eyes and ears must have been filled with snow, sleet and ice, could have seen the train in time to avoid the accident. Gregory, who had also been out in the storm, says, "I couldn't see any further than the horse's head, not unless I looked pretty sharp, on account of its snowing and blowing so."

2d. It is also assumed by the court in this case, that decedent did not look, did not use due care and caution. Upon what principle of law can such a proposition be founded? Upon what legal principle can the court base such an assumption of fact? There is no proof in the case that decedent was guilty of negligence—that he did not use his eyes and ears; that he did not use that degree of care and caution which a prudent man would do under like circumstances. When the decedent is killed, can you assume as a fact

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that he did not look ? The presumption of law is (he having been killed), that he exercised that ordinary care which the law requires, to save himself from harm (*Vide* DENIO's opinion, 20 N. Y., 68, 74; See opinion by FOSTER, J., in *Gonzales agt. H. R. R.R. Co.*, 39 *How.*, 423.)

3d. Not only does the court assume all the foregoing propositions without evidence; it goes further and holds it to have been the duty of the decedent, who was a stranger, at any rate to the particular location of the railroad, not only to look both ways, but also behind him, to see that there was no train following on a road nearly parallel to the one he was traveling.

Courts nonsuit when the negligence of deceased is shown by the evidence, but this is the first case in our knowledge in which negligence has been presumed by the court when there was no evidence of it.

Fourth. If the railroad company can, with impunity, violate every law passed for the protection of human life, be guilty of the grossest, culpable negligence, disregarding every safeguard made for the protection of the traveler using the public highway crossing the railroad, no matter what may be the circumstances surrounding the case; if this court, in the case at bar, with all its surrounding circumstances, before it, the deceased a comparative stranger in the county, residing miles distant, with no evidence that he was ever in the neighborhood of this crossing before, no bell rung or whistle blown, the signboard down, the railroad track covered with three or four inches of freshly fallen snow, completely obscuring the track at the crossing, no flagman there, a dense snow-storm prevailing at the time of the accident, with the wind blowing from the north-west drifting the snow directly into the eyes of the decedent, his team approaching the crossing upon a walk; Gregory, the cartman, turning out to the right and passing Hackford eight or ten feet east of the crossing with his team on a walk, and passing over but a few feet ahead of him; shall hold, as a matter of law, that the plain-

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tiff cannot recover, then under what state of facts can any person ever hope to maintain an action against a railroad corporation for an injury received at a public highway. If the court shall hold in this case, that because it is not shown by positive proof that the decedent did look up and down the railroad track before he attempted to cross, with this terrible snow-storm prevailing at the time and when he could not have seen the train in time to have avoided the collision, that the plaintiff cannot recover then I ask: under what state of facts can a person ever hope to recover an action of this kind? You directly encourage the railroad company and its servants to a reckless disregard of those laws passed for the protection of human life, you say to him, run your ponderous trains through cities and villages and across thickly crowded thoroughfares; and no matter if you are guilty of culpable negligence and the unsuspecting traveler is crushed to death, his widow or next of kin cannot recover. Of what avail will it be to pass those laws and regulations if they are to become, by the sanction of this court, a dead letter, and which a powerful corporation is allowed to disregard with impunity, jeopardizing life and limb?

Fifth. I think a little reflection will satisfy the members of this court that the unsettled state of the law in this state, upon questions of this kind, is attributable to the courts attempting to decide questions of fact by legal rules, instead of allowing that question to be passed upon by a jury; and Judge PORTER, at the close of his exhaustive opinion (35 N. Y., 41), has well remarked that "the correctness of judicial opinions in mere questions of fact may well be distrusted when we find them confessedly opposed to the common sense of mankind."

As we read the reported cases upon this question, how forcibly are we reminded of that salutary maxim: "*Ad questionem facti, non respondent iudices; ad questionem legis, non respondent juratores.*"

Lastly. It is submitted that, upon the facts of this case, it

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could not be decided, as a matter of law, that he was negligent, but that it was for the jury, under all circumstances, to say whether decedent was guilty of negligence contributing to produce the injury he received; and that in determining whether the decision at the circuit should be sustained, it is a fair test to inquire whether, in case the cause had been submitted to the jury and a verdict rendered in favor of the plaintiff, it should have been set aside as against evidence. If a verdict had been rendered in favor of plaintiff, could it be said, in the language of Judge GROVER, in *Cathran agt. Collins* (29 How., 155), "That the case was so flagrant as to show passion, prejudice, or inattention to their duty, on the part of the jury"?

PRATT, MITCHELL & BROWN, *for defendant.*

The plaintiff's intestate, on the 18th day of December, 1869, came with his team, from his home in the town of Marcellus, to the city of Syracuse, with a load of potatoes, and upon his return, as he was crossing the track of the defendants, near the village of Geddes, his horses were struck by the locomotive of a train going west, and he was thrown out of his wagon and killed.

The track, for several hundred feet on both sides of the crossing, was in plain sight of the highway, for nearly a half mile east of the track. The intestate passed one or two teams, near the track, that had stopped for the train to pass; a man stepped before his horses and tried to stop him, but he recklessly drove on, giving no heed to the warning, until his horses were struck.

Witnesses, as usual, testified that they did not hear the bell ring, or the whistle sound; and it was proved that the usual sign, "Look out for the cars when the bell rings," had been taken down in repairing the canal bridge near by, and had not been replaced. It was also proved that it was snowing at the time of the accident.

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Upon this evidence the plaintiff was nonsuited, on the ground that the proof did not show that the intestate was free from negligence, on his part, contributing to the injury.

I. To sustain the action in this case, it was incumbent upon the plaintiff to show that the death of his intestate was occasioned by the negligence of the defendant, and that the intestate was free from any negligence on his part. The plaintiff holds the affirmatives of both propositions.

1st. Although, under certain circumstances, a presumption may arise that the injured party exercised due care, yet upon the broad issue, the plaintiff has the affirmative.

2d. Thus, when a person is injured by a train crossing the highway, he must show that he exercised due care on his part.

3d. If, therefore, the highway and track are so situated that a passing train may be seen from the highway by a person approaching the track, in time to avoid a collision, he will be charged with negligence if he does not avoid it.

4th. It is now the settled law that he cannot depend upon hearing the bell or whistle, but due care requires him to look and see if there is not an approaching train, and the law holds him negligent if he neglects thus to look. No degree of negligence on the part of the company will excuse him (*Baxter agt. The Troy & Boston R.R. Co.*, 41 N. Y., 502; *Grippen agt. The N. Y. C. R.R. Co.*, 40 N. Y., 34; *Ernst agt. Hudson R. R.R. Co.*, 39 N. Y., 61; *Gorton agt. N. Y. C. R.R. Co.*, decided June Term, 1871, 4 *Alby. L. J.*, Sept. 2. 95).

II. Under the law as thus settled, the court was clearly right in nonsuiting the plaintiff upon the trial.

1st. The evidence showed that a train of cars on the track would be in plain sight of a man traveling on the road for a long distance before reaching the track.

2d. The suggestion that the show storm, was so severe that a train could not be seen, is not supported by the proof.

(a.) Gregory, it is true testified that he could not see be-

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yond his horse's head, and yet he testified that he saw from the centre of the bridge, the horses and man after the collision, a distance from seven to twelve rods.

(b.) Allen was six rods east from the crossing, and saw the train five or six rods south. He seems to have had no trouble in seeing through the storm.

(c.) Ready was seven or eight rods off, and had no difficulty in seeing.

(d.) The drivers of the other teams must have seen or heard the train, or they would not have stopped to let it pass.

3d. Nor is there anything in the suggestion that the deceased did not know that the track crossed the road at that point.

(a.) He had resided in Marcellus two or three years, had frequently been to Syracuse, and the presumption is that he was acquainted with the road.

(b.) Besides upon this point the burden of proof was on the plaintiff. The deceased was apparently negligent. The burden was, therefore, upon the plaintiff to explain his conduct.

4th. Again: He was warned of the danger, and paid no heed to the warning, showing not only negligence, but criminal recklessness.

(a.) He must have seen the other teams that had stopped to let the train pass.

(b.) McDonald put himself in front of his team and tried to stop him, but he recklessly drove on.

(c.) All the evidence shows that he saw the train, but supposed he could get by before it should reach the crossing. At all events he took the chances.

III. No valid exceptions were taken to the rulings of the court in the admission or rejection of evidence.

1st. The exception at folio 15 of the case is not well taken. The way a man would naturally look on approaching the crossing, is not a question of skill or science. The witness,

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therefore, could have no better knowledge than the jury of that question.

2d. The exclusion of evidence of other accidents at that crossing was clearly right. The issue was as to the negligence of the defendant upon this occasion, and not upon other occasions.

3d. The ordinance of the village regulating the speed of trains was entirely immaterial.

(a.) There was no proof that the speed was unusual, and if there had been, the ordinance could have had no influence upon that question.

(b.) Nor could it legally affect the question of the negligence of either plaintiff or defendant (*Brown agt. Buffalo & State Line R.R. Co.* 22 N. Y., 191).

IV. A new trial should therefore be denied, with costs.

By the court, MULLIN, P. J.—The plaintiff, as administrator, brought this action to recover damages for the killing of William Hackford at Geddes, in the county of Onondaga, in December, 1869, by reason of the negligence of the employees of defendant. The deceased was driving his team from the city of Syracuse to his residence, some fifteen miles from the city. It was a very stormy day, snow was falling, and the wind was blowing very hard.

The street, along which the deceased was driving, runs east and west, at the railroad crossing, where the accident occurred, and it crosses the track at nearly right angles. The deceased was going west; the engine, by which he was struck, was moving north at about twenty miles per hour. There was no sign up, indicating that there was a railroad crossing at the place of the accident; the sign that had been up having been removed. A carman, with furniture in his cart, crossed the track just before the deceased attempted to cross; there were other teams approaching the track from the east.

The drivers of the other teams stopped, seeing the ap-

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proaching engine and cried "whoa" to the deceased just before he got on to the track; the deceased did not regard it, but drove on and was instantly struck and killed.

On the trial, plaintiff's witnesses testified to the foregoing facts and, also, that as the engine approached the track, the bell was not rung, nor was the whistle blown. These omissions of duty, together with the rate of speed and absence of a sign indicating the crossing, constituted the negligence on the part of the defendant.

The defenses set up in answer were: *first*, a general denial; and, *second*, concurring negligence on the part of the intestate.

The evidence of negligence on the part of the intestate was:

1st. That the railroad track could be seen by a person going from Syracuse, towards the crossing, for a distance of some half a mile, except where houses intervened. The track was higher than the land on either side and higher than the street. Near the crossing a train could be seen for a distance of fourteen hundred feet in one direction, and an eighth of a mile in the other.

Henry G. Allen testified that he lived at Geddes, in a house on the north side of Genessee Street, some six or ten rods from the crossing. He was in the street at the time of the accident, and saw the train approaching some six or eight rods from the crossing.

Michael Ready testified that he lived in Geddes, on the northwest side of Genessee Street, and east of the railroad. At the time of the accident he was standing seven or eight rods from the crossing. Heard a man shouting "whoa"; looked up and saw the train passing, and just about the same time saw smoke stack of the engine, and then the collision occurred almost instantly, not a half a second after he heard the cry of "whoa." The intestate, with his team, passed along pretty swift. When he first saw the intestate,

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he was within a rod of the track, and when he saw the engine the intestate was going right on to the track.

Justin M. Woodford testified that the storm was very severe; so severe that you could not see many rods.

Henry D. Gregory was the carman who crossed the track ahead of deceased, and he testified that before he crossed he did not hear or see the cars. He could not see, by reason of the storm, any further than the horses' heads, not unless he looked pretty sharp.

Upon this evidence the plaintiff was nonsuited, on the grounds that the deceased was himself guilty of negligence.

The plaintiff's counsel asked the court to submit the question of concurring negligence to the jury.

The request was refused on the ground that there was not sufficient evidence to go to the jury; and to this ruling plaintiff's counsel excepted, as he did to the granting of the nonsuit.

The court committed a grave error in refusing to submit the question of concurring negligence of the deceased to the jury. Had the day been a fair one, so that there was nothing to prevent a person from seeing and hearing an approaching train, I should be of opinion that the deceased would have been chargeable with the grossest negligence. The day was a very stormy one; the wind was high and snow falling in large quantities, and of course it was carried by the wind against the faces of those travelling against the wind. From what point of the compass the wind was blowing on the day of the accident does not appear in the case.

But it does appear that the man who crossed the track just ahead of the deceased could not see further than his horse's head, unless he looked pretty sharp.

There is no evidence that a person approaching the track could see an approaching train at a greater distance than six to eight rods from the crossing.

If the train was moving twenty miles per hour, it would move the distance of six rods in a little over a second. If

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then we could assume that the deceased saw the engine six rods before it reached the crossing, he had no time to save himself, he must have been on the track and escape impossible.

If we assume that he did not look for an approaching train, and it would, under ordinary circumstances, be negligence not to look, yet when it is demonstrated that if he had looked, he could not have escaped injury or death, surely his right to recover of the party whose negligence caused the injury would not be denied him?

Again it was shown that the man who crossed ahead of him, did not hear the approaching train, and by reason of neither seeing or hearing it, nearly lost his own life, must we not assume that the deceased did not hear it, and therefore, his senses failed to apprise him of his danger.

Is it probable that two men rushed recklessly into the jaws of death, having knowledge that death was imminent?

If we are to indulge in presumptions, is it not the rational one that men use their senses for their protection when they have reason to suppose that danger is impending.

If upon the evidence given by the plaintiff, the jury could reasonably feel that, by reason of the storm, the deceased could not, in the absence of ringing of the bell, or the blowing of the whistle ascertain the approach of a train in time to escape a collision with it, would not a verdict for the plaintiff have been sustained. That such a state of facts might have been found from the evidence, I entertain no doubt.

It was, therefore, the duty of the court to submit the question to the jury, as to the concurring negligence of the deceased, and because the request to submit it was refused, a new trial must be granted.

The learned judge said, in granting the nonsuit, that the plaintiff had the affirmative of showing by the evidence that he was free from any negligence that contributed to the production of the injury.

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This remark cannot be the ground for granting a new trial, if it is erroneous, but it may be taken into consideration in determining the weight the court gave to the evidence of the concurring negligence of deceased, when it refuses to submit the question to the jury.

If the learned judge intended to hold that the plaintiff is bound to allege in a complaint in an action for damages resulting from an injury caused by the negligence of the defendant, and to prove affirmatively on the trial that he (the plaintiff) was not guilty of negligence that contributed to the injury, he was mistaken.

The concurring negligence of the plaintiff is matter of defense, and the plaintiff is under no obligation to prove anything to entitle him to recover but the injury, and that it was caused by defendant's negligence.

No precedent of a common law declaration in case for negligence can be found, I think, in which plaintiff asserts that he was free from negligence, nor any decision that he is bound to make such proof. (See precedents in case for negligence in 2 *Chitty's Pleadings*.)

But where, on the trial, there is evidence of negligence on the part of plaintiff, whether it comes from plaintiff's or defendant's witnesses, the plaintiff must overcome it, in order to entitle himself to recover. In this way, and in this way only, is the plaintiff bound to disprove his own negligence.

To meet the view of the court, that the plaintiff had the burden of proving the absence of negligence, affirmatively, a higher degree of proof was demanded than he was bound to make, and thus wrong was done to the plaintiff.

If, however, the court merely meant to say, the plaintiff's own evidence shows his negligence, and that it concurred to produce the injury, he must, therefore, give evidence to rebut the inference of negligence resulting from the evidence he had himself given, he was, doubtless correct. If plaintiff's witnesses proved defendant's defense, it was as available as if proved by itself. This construction of the charge would

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hardly be consistent with the proposition that the plaintiff held the affirmative of disproving negligence.

If it had, it must follow that the law must presume negligence against him, on the contrary, negligence is never presumed, but must be affirmatively proved. There must be a new trial with costs to abide the event.

NOTE.—It seems that this case turned on the ground that it was a very *stormy day* when the collision and death took place. For it is admitted that the deceased would have been chargeable with the grossest negligence, had the day been a fair one.

Now should not the deceased have exercised a corresponding degree of care and caution in crossing the railroad on a stormy day, to what he would have been required on a fair day. Was it not his duty on approaching near the railroad track to *stop*, and if he could not see as far as usual in fair weather, to listen attentively to hear an approaching train, especially so when the action of some of the other teamsters was such as to assure him that a train was near at hand, instead of rushing on blindly, in a snow storm, with such evidence before him of danger from a coming train.

This case is somewhat analogous to that of *Ernst* agt. *Hudson R. R. Co.*, our views of which are given pretty fully in a Note in 36 *How.* p. 84. A case where we think eventually, great injustice was done by mulcting the railroad company in a sum of \$5,000, damages, when it appeared to be a very clear case for a nonsuit.

The theory upon which these railroad collisions occur at a highway crossing, we think to be, generally, an impatience of delay, an aversion to stopping until the danger is past. To be sure, considerate, cautious and timid people are careful and do not give way to this impatience of restraint, but are willing to allow any reasonable length of time to pass, when necessary, to avoid danger. But take the commonality of people who drive teams upon public highways, it is different. Such persons get accustomed to railroad as well as to highway travel. A man of this description in crossing a railroad track with his horses and waggon, would very likely cross in front of an engine so near that the hind wheels of his wagon would barely clear the engine, and after he had got across stop his team for five minutes, and turn around and look at the train, saying to himself, "that was a pretty close shave," when nothing would have induced him to stop two minutes on the other side and let the train and the danger pass on before him.

In the case of *Ernst* (*supra*), who stopped with his team, at Deerslyne's tavern in the village of Bath, opposite of Albany, a day or two before New Years, and probably after refreshing the inner man and feeling pretty comfortable, went out, unhitched his horses, jumped into his sleigh and sat down on the bottom of it, with a shawl around his face and ears, steered his horses for the ferry boat, which he knew was waiting for him, and neither looked to the right nor left, although he must have seen, and probably heard the three men, one on his right, one on his left, and one directly in front of him, warning him that an engine and cars were close at hand, and to stop, before crossing the railroad, yet, we have no doubt this principle of impatience of delay or restraint, induced him to urge forward his horses, with the hope and expectation that he would be able to cross before the engine reached him. In this, however, he was mistaken.

It is not that people incline to rush into danger and death in these cases, but the desire to avoid both, by a course involving great risk.

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We still adhere to and insist, that the rule promulgated by Judge E. DARWIN SMITH, when the case of *Ernst*, was first before the court of appeals, is the true, salutary and humane one, to wit, on crossing a railroad in constant use, the person crossing should look each way upon the track to ascertain whether a train of cars is approaching. We are aware that this rule has had its stabs and thrusts with a zeal worthy of a better cause, but we think that it abideth still unscathed and unharmed. For it does not require the performance of a duty which the person does not owe to a mismanaged, careless and negligent railroad company; nor has it any reference to the culpability or liability of a railroad company whatever. It has for its object a higher and nobler end—the preservation of human life, which is the highest law of our nature.—REP.

In the matter of Sacchi.

U. S. DISTRICT COURT.

In the matter of ERNEST SACCHI, bankrupt.

The purpose and design of the *bankrupt law*, is to bring the property of the bankrupt into the bankrupt court for administration; and that court is furnished with all needful power to liquidate and settle all liens thereon; and where there are adverse claims, which it is not appropriate or proper to litigate by summary inquiry and order, provision is made by giving jurisdiction to the district court, concurrently with the circuit court, for that purpose.

State courts have jurisdiction, it is true, to entertain bills for the foreclosure of mortgages upon the real estate of a bankrupt, and may, no doubt, properly exercise that jurisdiction, if no objection is made.

In general, mortgagees should not be permitted to pursue the estate of the bankrupt in the state court, but should come to the tribunal which, under federal laws, is charged with its administration.

Upon a review by the circuit court of the decision of the district court, denying an application to remove the assignee in bankruptcy, on the ground of bad faith in the management of his trust, this court will deny the application, on the ground that the register and district court had all the proofs before them and their decision thereon, adverse to his removal, should not be disturbed by this court.

In this case, *held*, that it was either misapprehension on the subject, or a disregard of the proper views of the bankrupt law, that led the mortgagees into the state court for foreclosure, after the bankruptcy, and after the appointment of an assignee, and that the resistance to any withdrawal of the administration from the bankruptcy court, the proper tribunal, has resulted in bitter personal feeling, great and unnecessary delay, &c.

Also *held*, that it appears, pending the controversy, the petitioner for the review has become the sole creditor of the bankrupt, and that no other property of the bankrupt has come to the assignee, except the mortgaged premises, and the bankrupt having united in the petition for the substitution of an assignee to be named by the petitioner, as such sole creditor, and the assignee, by his counsel on the argument of this review, declared his entire assent to such change: Therefore, no reason exists why the prayer of the petitioner to that extent should not be granted.

March 27, 1872.

A. C. MORRIS, *for petitioner.*

TRACY, CATLIN & VAN COTT, *for assignee.*

In the matter of Sacchi.

BENEDICT, J.—This case comes before the court upon a petition for the removal of an assignee chosen by the creditors of the bankrupt.

The petition is filed by Gustavus A. Sacchi, who since the adjudication of bankruptcy, has become the sole creditor by a purchase of all the debts.

If the petitioner had sought an order for the substitution of an assignee of his own choosing in place of the one originally chosen by the creditors upon the ground that he had become the sole creditor, I should have felt disposed to grant the order. But such an order is declined and the retention of the present assignee asked to be made dependent upon the decision of the court on the charges of misconduct made against him in the petition.

The complaint against the assignee is, that without sufficient cause he attacked two mortgages upon the bankrupt's property known as the "Brooklyn Market," one of \$15,000, held by Henry Mill, the other for \$30,000, held by the petitioner, and that he has delayed a sale of the property for the purpose of obtaining the rents in order to spend them in litigation.

I have examined with some care the circumstances under which the assignee interposed a defense to the mortgages in question, and stopped the foreclosure proceedings taken in the state court to procure a sale of the property in question, and I find nothing to support a charge of misconduct against this assignee, but on the contrary, much to justify his attack upon the mortgages.

I am confirmed in this opinion by the fact, that none of the creditors except the petitioner appear to have complained of the action of the assignee, that Mill, whose mortgage of \$15,000 was attacked for usury, does not appear here to complain, and that where the mortgage of \$30,000 held by the petitioner, who is the father of the bankrupt, was attacked, he brought up all the creditors interested to push the attack at a loss of \$4000, as he says.

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In view of all the circumstances, I am inclined to think, that it would have been good ground for an application for the removal of the assignee if he had omitted to attack the mortgages.

Nor is the method adopted by him in his endeavor to release this property from the mortgages open to criticism. The charge that he delayed the action of the mortgages in order to collect rents to spend in litigation, is wholly unsupported by the evidence, the proofs do not show that he ever collected any rents, or how much he has spent in litigation. The assignee admits that he has paid or became liable for fees in the defense of the suits brought to foreclose the mortgages referred to, but no amount is stated or proved, and so far as the evidence shows there is no fact which will warrant the inference that the defense of the suits was interposed for any other reason except to protect the property from what he supposed to be an illegal demand. It is true, that the assignee might have applied sooner than he did for an order directing the sale of the property, but when he did apply the petitioner opposed, and moreover, it is by no means clear, that the property could with due regard to the interest of the creditors be sold earlier than even the present time.

If the petitioner desired for his own interest to realize upon his mortgage proper proceedings on his part in this court would have given him relief (1 *Dillon*, 511). The petitioner failed to apply to this, and took proceedings in the state tribunals, thus compelling the assignee to resort to injunctions in order to stop his proceedings there and save the property for distribution among the creditors in this court where its distribution properly belongs.

The prayer of the petitioner is therefore denied, with costs of the proceedings to be paid out of the funds.

WOODRUFF, J.—The present is an extraordinary appeal to the circuit court. The petitioner for the review of the

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decisions of the district court seeks to remove the assignee in bankruptcy, on the ground of bad faith and mismanagement in his trust, and applies to this court to remove the order denying his application in the form of the express decision and opinion of the register in bankruptcy, and of the district judge, upon the proofs herein, that the assignee would have been derelict in his duty if he had not done substantially what he did.

Had it been possible for the assignee to obtain these opinions in advance upon these same proofs, counsel would hardly have presumed to say that the assignee was guilty of official misconduct calling for his removal because he acted in accordance with those opinions. And yet the court is asked to condemn him as guilty of official misconduct for doing what both the register and the district judge approve. As both of those had all the proofs before them which are before me, the claim on this appeal that those proofs show wilful misconduct comes very little short of an attack upon the integrity of the tribunals by whom the proofs were deemed to justify the assignee. Certainly I ought not to impute wilful misconduct and bad faith to the assignee because he drew from the circumstances before him the conclusions which the register and district judge approve.

The question here is not whether in fact there was illegality in the mortgages, the foreclosure of which the assignee resisted, but whether such resistance was fraudulent, malicious or from unjust motive, and not in good faith for the benefit of the creditors. However, I might conclude, that upon the whole case the mortgages were valid; that the holders had a right to an early foreclosure, and that delay, while the rents, if any, passed into the hands of the assignee, operates prejudicially to the holders of the mortgage. This would come far short of holding that under the circumstances which under the advice of counsel were deemed suspicious—circumstances which the register and district judge have declared suspicious—the assignee acted

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on the suspicion and sought to bring the inquiry into the proper court for investigation. But it is not true that had the mortgagees seen fit to assert their rights in the mode which was most appropriate, any injustice would have been done to them, nor would unnecessary delay have been permitted to occur to their prejudice.

The purpose and design of the bankrupt law is to bring the property of the bankrupt into the bankrupt court for administration; and that court is furnished with all needful power to liquidate and settle all liens thereon; and where there are adverse claims which it is not appropriate or proper to litigate by summary inquiry and order, provision is made by giving jurisdiction to the district court, concurrently with the circuit court, for that purpose. It is true, that state courts have jurisdiction to entertain bills for the foreclosure of mortgages upon the real estate of a bankrupt, and may no doubt properly exercise that jurisdiction, if no objection is made. Special circumstances may sometimes exist in which there is no reason for objection by the assignee, as, for example, when the mortgaged premises are confessedly of less value than the mortgaged debt (*In re Iron Mountains Company, Northern District of New York January, 1872*), and where a foreclosure is pending and the proceedings are nearly completed at the time proceedings in bankruptcy are commenced, it may sometimes be convenient and economical to suffer the validity of the mortgage and the amount due to be settled in the state court; and, even then, whether to permit a sale by the decree of the state court or not, will be in the discretion of the court in bankruptcy. In general mortgagees should not be permitted to pursue the estate of the bankrupt in the state court, but should come to the tribunal which under federal laws is charged with its administration. No injustice can result from this. If there be no doubt whether the mortgaged premises are adequate security for the payment of the debt and interests (when finally adjudged due upon a valid mortgage) the court will recognize the prior

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lien of the mortgage upon the land and the equitable right of the mortgagee to have the rents separated from the general estate of the bankrupt, by a receivership or otherwise, and not permit them to be applied to the payment of other debts or even to the expenses of the assignee or his fees, and on the obvious ground that he is only entitled to the interest which the bankrupt has in the premises. Nor will any delay be permitted without just reference to the interest of all who are concerned, the mortgagees as well as other creditors.

Nor do I think it doubtful that where no just cause for questioning the validity of the mortgage exists the courts in bankruptcy would entertain the summary petition of a mortgagee for the sale of the mortgaged premises, and direct the assignee to make the sale either free of all liens or subject to the mortgages, as might be deemed judicious. Nor if the assignee disputed the validity of the mortgage is it doubtful that under the jurisdiction declared in the second section of the bankrupt law, the mortgagee may proceed by bill in either district or circuit court.

It is, therefore, an error to insist that the mortgagee, if not permitted to proceed in the state court, is remediless, or that he must await the pleasure of the assignee and suffer him to collect the rents and interest of the mortgaged premises, leaving the interest unpaid. I can see, I think, that it is either misapprehension on this subject or a disregard of these views that led the mortgagee in this case into the state court after the bankruptcy and after the appointment of an assignee, and that the resistance to any withdrawal of the administration from the bankruptcy court, the proper tribunal, has resulted in bitter personal feeling, in great and unnecessary delay and in large expenses and possible loss, which might have been easily avoided.

It further appears that pending the controversy the petitioner for the review has become the sole creditor of the bankrupt (other than two paid mortgages of the premises in question), and that no other property of the bankrupt has

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come to the assignee, except the mortgaged premises. The bankrupt united in the petition for the substitution of an assignee, to be named by the petitioner as such sole creditor. The assignee, by his counsel, in the argument of this review, declared his entire assent to such charge. There is, therefore, no reason why the prayer of the petitioner to that extent should not be granted, the present assignee having allowed the use of any moneys collected, his first and reasonable disbursements, and his commission for the moneys received and paid, or to be paid. But it would not be just or reasonable to allow him, as was suggested on the argument, commissions based upon the speculative idea that, possibly if continued in office and permitted for the mere purpose of earning commissions to litigate the validity of the mortgages against the will of all who are interested in that question, he might establish their invalidity.

The bankrupt law was not enacted for the purpose of enabling assignees to earn fees by unnecessary litigation, when no interest of the parties to be affected thereby requires it, and where, on the contrary, every beneficial interest involved therein forbids it. Had it, therefore, appeared that, upon the conceded fact, that there are no general creditors but the petitioner, and therefore, no interest is to be served by further contest respecting the mortgages (the bankrupt himself uniting in the petition), the district court had refused to substitute such other assignee, there might have been reason for asking the court to review the decision. But it appears by the decision of the district judge that the petitioner, declined to take such substitution unless it proceeded upon other grounds, and this also was conceded on the argument in this court. This however, does not appear by the order which was made, and which is under review. It ought, I think, to have been made a part of the order, but it should stand on the record on adjudication that the petitioner was not entitled, upon conceded facts, to have any part of the relief sought. The mere fact that the petitioner, under

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the advice of his counsel, thought himself entitled to a removal of assignee on the other ground, probably ought not to deprive him of the opportunity to bring the matter to a close without further litigation.

Let an order be made that the assignee carry the estate of the bankrupt to such assignee as the petitioner and the bankrupt may name; or if they do not agree, to refer it to register Winslow, to receive the nomination of the petitioner, and if he approve of such nomination, then to the assignee so approved, but reserving to the present assignee all moneys collected by him, until his just allowance for his expenses and for his commissions thereon shall be settled in such manner as the district court may direct.

Campbell agt. Erving.

SUPREME COURT.

JAMES CAMPBELL, *et al.*, agt. ELIZABETH F. ERVING, *et al.*

A widow who elects to take and accepts a gross sum from surplus moneys paid into court under a judgment of foreclosure, in lieu of her dower right, is entitled to the full sum accepted, free from any costs or commissions on a reference in obtaining it.

Special Term, Chambers, New York, May 28, 1872.

THIS was a motion to confirm a referee's report, upon an application for surplus moneys arising from a sale under a judgment of foreclosure.

There were but two claimants, the widow and the heirs of the owner of the equity of redemption.

The widow elected to accept a gross sum in satisfaction of her dower right, which was computed by the referee upon the amount paid into court, by the referee under whose direction the sale was made, and the amount so found due was directed to be paid to her, free of all charges, costs, &c.

The motion was opposed upon the ground that the widow's share was chargeable *pro rata*, with the legal commissions and charges of the city chamberlain for receiving and paying out said moneys, and with the referee's fees and the costs of proceedings upon this application, and that the same should be deducted from the amount so reported due her.

WAKEMAN & LATTING, *for widow.*

RICHD. L. H. FINCH, *for guardian, ad litem, and others.*

The court, (LEONARD, J.) held, that the widow's dower right was not chargeable with these sums, and that there could be no reduction for the same from the amount so reported due her, and granted the motion, to confirm the report.

Younghanse agt. Fingar.

SUPREME COURT.

ROBERT YOUNGHANSE agt. ADAM FINGAR.

The defendant appealed from a judgment of a justice of the peace, rendered against him for \$95 damages and \$5 costs, to the county court, and he in his notice of appeal stated that "the judgment should have been more favorable to him in this particular, to wit: That said judgment should not have been for more than \$25. damages besides costs." The plaintiff did not serve any order to modify the judgment of the justice.

The plaintiff obtained a verdict in the county court for \$49 damages. The county court held and ordered that the plaintiff should recover costs in such court. The defendant appealed to this court, from such order of the county court, and this court affirmed the order.

The defendant thereupon appealed from the last mentioned order, to the court of appeals: That court held *unanimously* (by a written opinion) that the order was erroneous, and that the defendant was entitled to costs in the county court; for the reason that the plaintiff did not serve an offer to modify the judgment of the justice. But *dismissed the appeal* on the ground that such order was *not appealable*.

On a motion thereafter by the defendant, at general term of this court, for a re-argument therein, whether the plaintiff or the defendant was entitled to costs, in the county court:

Held, that it would be disrespectful to the court of appeals to disregard the opinion of that court, on the ground that such opinion is not absolutely controlling, because that court dismissed the defendant's appeal there. It was undoubtedly delivered with a view of *putting at rest* the question as to which party should recover costs in the county court in cases like this, as the decisions of this court have been conflicting in different districts on the question:

Held, also, that in accordance with the opinion of the court of appeals, a re-argument of the question, be granted, and that the defendant is entitled to costs in the county court, and that the order of the county court allowing costs to the plaintiff, be *reversed*, and that the defendant have a judgment for costs in that court, &c.

Fourth Department, Albany General Term.

Argued March 8, 1872.

Decided, Elmira General Term, May, 1872.

Before MILLER, P. J., POTTER and BALCOM, JJ.

THE plaintiff recovered a judgment before a justice of the peace for \$95 damages and \$5 costs. The defendant ap-

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pealed from the judgment to the Columbia county court, and the following clause was in his notice of appeal, to wit: "The appellant claims the said judgment should have been more favorable to him in this particular, to wit: That said judgment should not have been for more than \$25 damages, besides costs."

The plaintiff had a verdict in the county court for \$49 damages; and that court held and ordered that the plaintiff should recover costs in such court. The defendant appealed to this court from the order of the county court, allowing the plaintiff to recover costs. This court affirmed such order, allowing the plaintiff to recover costs.

The defendant appealed from such order of this court to the court of appeals. That court held unanimously, that the order was erroneous, and that the defendant was entitled to costs in the county court; for the reason that the plaintiff did not serve any offer to modify the judgment of the justice of the peace. But the court of appeals dismissed the appeal on the ground that such order was not appealable, to wit; that no appeal from the order could be taken to the court of appeals.

The defendant now moves for a re-argument in this court of the question, whether the plaintiff or the defendant was entitled to costs in the county court.

R. E. ANDREWS, *for plaintiff*.

BEALE & BENTON, *for defendant*.

By the court, BALCOM, J.—The opinion of PECKHAM, J., in the court of appeals, shows that all the judges of that court were of the opinion that the defendant and not the plaintiff was entitled to costs of the action in the county court. That opinion is in accordance with the decisions of this court in *Fox agt. Nellis*, (25 How., 147); *Myers agt. White*, (37 How., 393); *Reed agt. Moore*, (31 How., 264); *Loomis agt. Higbee*, (29 How., 232).

Younghaase agt Finger.

We would be disrespectful to the court of appeals if we should disregard the opinion of that court in this case, on the ground that such opinion is not absolutely controlling because that court dismissed the defendant's appeal there. It is true the opinion of that court, as to which of the parties should have recovered costs in the county court, was not necessary to the decision made, which was merely one dismissing the appeal. But it was, undoubtedly, delivered with the view of putting to rest the question as to which party should recover costs in the county court in cases like this. And I think, it was proper for the court of appeals to put forth the unanimous opinion of the judges in this case, on the question of costs in the county court; for the reason that the decisions of this court have been conflicting in different districts on the question. I hope my views, as to the propriety of the court of appeals unnecessarily expressing their opinion on a question in the case are the same they would be, if the opinion of that court had been adverse to the opinions heretofore delivered by me at general terms of this court in the sixth judicial district, instead of being in harmony with them.

It is true, that the question as to which party to this action should recover costs in the county court, arose since the section of the Code affecting the question was last amended; and that the court of appeals did not notice the fact in their opinion, that such section had been amended since nearly all of the decisions of this court on the aforesaid question were made. But the court of appeals decided such question as that section of the Code now is; and we should presume that the judges of that court were aware of all the amendments that had been made to that section.

The opinion of the court of appeals in the case is in full accord with my own judgment, and I think, we ought to be governed by it, although we might disregard it if we deemed it our duty so to do.

For these reasons, I am of opinion, that we should grant a

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On the said 2d day of May, Hon. E. B. Pottle and A. McDonald, Esq., appeared as counsel for the petitioners, and Hon. H. L. Comstock, appeared as counsel for contestants, Mason Reed, Addison Stearns and Charles Middaugh. The evidence closed on the 11th day of May, instant, and on the same day was submitted to me, together with objections raised by contestant's counsel for decision.

The conclusion to which I have arrived, renders it unnecessary for me to determine whether the consent of a majority of the taxpayers of said town has been obtained, for the reason that two of the objections raised at the threshold of the proceedings, are, in my judgment, fatal to the petitioners. Those objections are as follows:

1st. The petition does not state that the Geneva and Southwestern Railway Company is a corporation in this state.

2d. The petition contains a condition which renders the petition void.

To understand the force of these objections, it will be necessary to refer to the petition addressed to the county judge. The language of the petition is as follows:

"The undersigned respectfully represent that they are a majority of the taxpayers of the town of Gorham, in the county of Ontario, who are taxed for property (not including those taxed for dogs, or highway-tax only), upon the last preceding tax list of said town of Gorham; that they are assessed and taxed for, or represent a majority of the taxable property upon said tax list, and that they desire the said town of Gorham shall create and issue its bonds to the amount of fifty thousand dollars, and invest the same, or the proceeds thereof, in the stock of the Geneva and Southwestern Railway Company."

The condition of this petition is—If the said "The Geneva and Southwestern Railway Company" accept the subscription to its stock and payment therefor by the bonds or proceeds as authorized by this petition, they thereby forfeit all right;

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and hereby agree to make no claim to any bonds of said town of Gorham, or the proceeds thereof, by virtue of a certain other petition of the taxpayers of the said town, to issue the bonds of said town for a like amount and purpose, which petition was filed with the county judge of Ontario county, October 28, A.D. 1871. This petition is made under and in pursuance of chapter 925 of the laws of 1871, and all acts of which it is amendatory.

The language of section 1, of the statute above referred to, so far as it relates to what must be set forth in the petition, is as follows:

"Whenever a majority of the taxpayers of any municipal corporation in this state who are taxed or assessed for property, not including those taxed for dogs, or highway tax only, upon the last preceding assessment roll or tax list of said corporation, and who are assessed or taxed, or represent a majority of the taxable property upon said last assessment roll or tax list, shall make application to the county judge of the county in which such municipal corporation is situate, by petition, verified by one of the petitioners, setting forth that they are such majority of taxpayers, and are taxed or assessed for, or represent such a majority of taxable property, and that they desire that such municipal corporation shall create and issue its bonds to an amount named in such petition, and invest the same, or the proceeds thereof, in the stock or bonds (as said petition may direct) of such railroad company in this state, as may be named in said petition, it shall be the duty of the said county judge to order," &c.

The language of said section, so far as it relates to the conditions which the petition may contain, is as follows:

"The petition authorized by this section, may be absolute or conditional; and if the same be conditional, the acceptance of a subscription founded on such petition, shall bind the railroad company accepting the same to the observance of the condition or conditions specified in such petition; provided, however, that non-compliance with any condition inserted in

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such petition shall not in any manner invalidate the bonds created and issued in pursuance of such petition."

The above objections will be examined in their order.

1st. It will be seen that "The Geneva and Southwestern Railway Company" is not set forth in the petition as being a corporation in this state. It nowhere appears in the petition that it is in this state; indeed, its locality is not stated at all. Courts cannot take judicial notice of the location of corporations, unless the same is at least alleged. It cannot be presumed that the "Geneva and Southwestern Railway Company" is a corporation in this state, by the mere naming the company.

It is a well settled principle that in actions at law where the complaint sets forth the name of the corporation and describes it as a corporation in this state, duly organized under the laws thereof, that, however truthful this allegation and description may be, yet if the answer denies it, however false that answer may be, the court cannot take judicial notice of the existence of the corporation.

In such case, the popularly well known corporation, known as the New York Central and Hudson River Railroad Company, cannot, in an action at law, be presumed by the court to be a corporation in this state; in other words, the courts cannot, in such, case, take judicial notice of its existence. I do not understand this proposition was disputed on the argument, but it was contended by petitioners' counsel that if the petition alleged a railroad corporation which is in fact in this state, though not so stated in the petition, it is sufficient, and that fact could be proved *aliunde* the petition.

It must be remembered that this statute is in derogation of the common law, and therefore, must be strictly construed, as the courts have frequently held. If it would seem hypercritical to hold, even under the rule of strict construction, that the petition is invalid, because it does not set forth a corporation in this state, in terms. Yet, by another rule of construction, prevailing in criminal cases, which in principle

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is applicable here, the corporation must be set forth in the petition as being in this state, because it is, at least in the enacting clause, provided that such company shall be a railroad company in this state. By this proviso, so to speak, no company other than a railroad company in this state, can receive the benefit of this act.

It is a well settled principle that—"Where the proviso adds a qualification to the enactment, so as to bring a case within it, which, but for the proviso, would be without the statute, the indictment must show the case to be within the proviso" (*Wharton's American Criminal Law*, § 379, and cases cited).

But it is enough for me to say, that this question has been decided in the third judicial department, in the case of *The People ex rel. Hoag agt. Peck*, 4 *Lansing*, 532).

In this case, the petition sets forth that the railroad company named, is "a railroad company in this state," (New York.) His Honor Judge DANIELS, who writes the opinion of the court, says:

"The statutes relating to these proceedings certainly contemplate that the railroad company shall be incorporated before they can be lawfully taken; but they contain nothing requiring that to be proved as a fact before the county judge, or to be stated with any special particularity in the petition. What they require is, that it should be a railroad company within this state, and be named in the petition. And that was complied with in this case. It could not be a railroad company in this state, unless it was incorporated under its laws. And the statement of what the statute requires the petition to contain is necessarily an averment that the company has been so incorporated."

It will thus be seen that the statement in the petition that the company is a corporation in this state, is equivalent to alleging its due organization under the laws of this state, because, it cannot, under our statute, be a corporation in this state, unless it is duly organized. And the court says, the

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statute requires the petition to contain this statement. The petition before me, therefore, is invalid, for the reason of the omission of such statement.

If there can be any doubt as to the requirement of said section, that this averment must be set forth in the petition, it would not become me to ignore the plain language of the court above stated.

The petitioners' counsel, Mr. Pottle, conceded on the argument, it was not a clear question, but was willing to take the responsibility of a decision in favor of the petitioners. To thus decide, even though there might be doubt as to the construction which I have given to said section, would be an act of injustice towards the contestants whose property is sought to be affected without their consent, thereby casting the burden of the labor and expense upon them to review the proceeding. In such case the burden should be placed on those who seek the aid.

2d. Whatever doubt there may be as to the validity of the first objection, there can be none as to the second, by reason of the condition contained in the petition.

It will be seen by reference to the petition and condition above, that said condition in no way effects the bonding sought in this proceeding. So far as this proceeding is concerned, the petition is absolute.

The condition is simply, that the company, in case bonds are issued by virtue of this proceeding and accepted by the company, they thereby forfeit all right and agree to make no claim to the bonds in the first proceeding. No condition that bonds shall not be issued in this proceeding. No condition that the company shall not accept the bonds or the proceeds thereof in this proceeding. If bonds were issued by virtue of this proceeding, no one supposes the company would relinquish their claim to them or the proceeds thereof. That is the end sought by the proceeding.

The petitioners have given their consent to aid the company in this way, with the understanding that the town is

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not to be saddled with a debt of \$50,000 by virtue of the previous proceeding.

Is it to be presumed they would have given their consent to bond the town in this proceeding for \$50,000, if they had understood they were powerless to prevent the company from accepting the bonds or the proceeds thereof for \$50,000 more, in case the company is successful in that proceeding, which is now in the process of review? Yet such is the fact; and, if both proceedings are successful, the town may be bonded for \$100,000, in spite of the petitioners.

But it is said by petitioners' counsel, this condition shall not be violated; the company intend in good faith to abide by the condition, and in no event will accept from the town of Gorham to exceed the sum of \$50,000. Mr. Pottle, as counsel for petitioners, and as president of the company, pledges before me in his argument (to quiet all apprehensions on that subject), that this condition shall be strictly observed by the company. No one will doubt the good faith of the counsel, but the present officers of this company have no power to bind the action of their successors, and if the condition in question is illegal and unauthorized, as I think it clearly is, then the corporation is in no way bound by it. Manifestly it is no condition of this petition. The bonds sought to be issued in pursuance of this petition, are to be paid unconditionally, at all events.

This petition attempts to make a condition outside of it, and to incorporate it into the petition in the former proceeding, by which that shall become null in case this proceeding is successful.

The section of the statute above quoted, goes only so far as to authorize the petitioners in this petition to make the same conditional, and there stops. It does not authorize it to make or append conditions to or in any manner whatever to affect any other proceeding of the like nature.

The two proceedings are distinct and wholly independent of each other, and neither can in any way, interfere with the

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other. If either or both proceedings are successful, then the officers charged with the duty of carrying them into effect, must proceed and bond the town irrespective of any conditions whatever, and thus one of the main inducements of the petitioners, in giving their consent in this proceeding, will be utterly defeated.

Should it happen, as it is not improbable to suppose, that the former proceeding is pursued to a final consummation, while the proceedings by virtue of this petition are still pending, in process of review or otherwise, and such final consummation should result successfully to the petitioners, and the bonds thereon should be issued and accepted by the company, as it is very likely they would be, inasmuch as the result would yet be undetermined in this proceeding, then the town is clearly bonded in the sum of \$50,000.

In the event that the proceedings by virtue of this petition finally are successful, there is no power to prevent the town from being bonded for \$50,000 more. The issue of the bonds could not be restrained by injunction; an injunction can only be sustained where there is a violation of a legal right.

On what ground could an injunction be issued? It may be answered, upon the ground of a non-compliance with the condition in the petition in this proceeding, but the answer to that is, the act provides (§ 1, *above*), "that non-compliance with any condition inserted in such petition, shall not, in any manner, invalidate the bonds created and issued in pursuance of such petition."

For the reasons above stated, this proceeding must be dismissed.

Rathbun agt. Markham.

SUPREME COURT.

CHAUNCEY RATHBUN agt. CHARLES MARKHAM.

A motion to make more definite and certain, under section 160 of the Code, should point out wherein the alleged defect consists.

Monroe Special Term, April, 1872.

MOTION to make more definite and certain, parts of the complaint.

The notice of motion asked that certain allegations of the complaint specified in the notice, "being allegations so indefinite and uncertain that the precise nature of the charge is not apparent, may be required to be made definite and certain by amendment, or that said allegations may be stricken out as irrelevant and redundant."

J. H. STEVENS, Jr., *for motion.*

WILLIAM RUMSEY, *opposed.*

JAMES C. SMITH, *J.*—Motion under section 160 of the Code, to require parts of the complaint to be made definite and certain. Such a motion is a substitute for a special demurrer for want of form, and the moving papers should point out wherein the alleged defect consists. The motion papers in this case being defective in that respect, the motion is denied, but without costs (as the question is new), and with leave to renew it at the next special term, and time to answer is extended till that term. Ordered accordingly.

Livermore agt. Bainbridge.

SUPREME COURT.

CHARLES F. LIVERMORE, HENRY CLEWS, and others agt.
RICHARD BAINBRIDGE.

Upon the death of a sole defendant in an action, in which such defendant has interposed a counterclaim, and issue has been joined thereon, the representatives of such deceased defendant have a right to continue the action, if the cause of action is one which by law survives to them.

The action in such a case is not abated (*Code*, § 121), and the court will upon motion allow it to be continued by the executors.

Where a defendant interposes a counterclaim in an action, and asks for affirmative relief, and issue is joined upon his claim, he becomes an actor in the case, and may proceed in it as if he were in fact a plaintiff (*Affirming S. C., at Special Term, 42 How., 53*).

New York General Term, November, 1871.

THIS case is reported at page 53 of vol. 42 of *Howard's Pr. Reports*, where a statement of the facts will be found, and decision at special term. The plaintiffs appealed from the order allowing the executors to continue the case, to the general term.

E. R. ROBINSON, *for plaintiffs and appellants.*

ROBERT SEWELL, *for executors of defendant.*

By the court, CARDOZO, J.—So far as authority goes, it will be found, upon careful examination, that there are but two cases directly in point, one being the case of *Keene agt. La Farge* (1 *Bosw.*, 671), and the other the decision which we are called upon to review. Both decisions are made at special term, each of them by a judge of great learning and experience, and each entitled to equal and profound respect. I venture at any time with great diffidence to differ from

Livermore agt. Bainbridge.

either of those distinguished jurists, and on the present occasion, in view of the difference in their judgments, I think, the question may well be treated as a new one.

In remarking that there is no other decision in point, I have not overlooked either the case decided by Chancellor WALWORTH (9 *Paige*, 393), nor the cases collated in *Voorhies' Code*, (note i. to § 121, p. 111), nor yet the case of *Schuschar* agt. *Reimer* (1 *Daly*, 459).

Schuschar agt. *Reimer* was a motion after judgment had been had in favor of the defendant, and an appeal taken by the plaintiff; and it was decided on the ground that a writ of *scire facias* would lie whenever a new person was to be benefited or charged by the execution of a judgment to make him a party to it, and that the writ being abolished, a motion could not properly be made under section 121. That case has application here to the extent of showing that if the representatives of the deceased defendant can have the action continued at all, they may move under the section in question, and for that purpose I have cited it.

The other cases, except *Lorillard* agt. *Dias*, may be dismissed with the remark that they were all decided upon the ground that the cause of action did not survive, and therefore they have no applicability here.

Lorillard agt. *Dias* (9 *Paige*, 393) was decided upon the construction of a statute which, upon careful examination, will be found to differ from the Code. It is provided by 2 *R. S.*, p. 191, *Edmond's Ed.*, § 107, as follows: "When the cause of action shall survive, no suit in Chancery shall abate by the death of one or more of the complainants or defendants." That is as much of the section as it is necessary to quote for the present purpose. It will be observed that the statute does not provide for the death of one or all, but one or more. It might very well be held, as the chancellor did, that this action did not relate to a sole defendant, or all the defendants.

But our Code (§ 121) is different. It reads, "No action

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shall abate by the death, marriage or other disability of a party, if the cause of action survive or continue." Now, it is very well settled that the word "party," includes all the individuals constituting the "party" plaintiff or defendant. This is a case plainly and literally within the very words of the section. A "party," the party defendant, has died, and the statute says that shall not abate the action. It does not say that the death of "one or more of the plaintiffs or defendants," but the death of a "party" shall not affect the action. In this case, there was but one defendant. He was the "party" defendant. That "party" has died; but the Code says that the action, nevertheless, shall not abate. As the action is not abated, I think the proper construction of the section and the right rule of practice is that the representatives of either party having an interest in the suit may have an order to continue it.

In the present case, the defendant's representatives have a very clear interest. They want judgment in their favor on the counterclaim.

The fact that usually the court would permit the plaintiffs on the record to discontinue the action, notwithstanding the interposition of a counterclaim, does not militate against this view. There is no absolute right to such discontinuance. The question of allowing it is in the discretion of the court, which will exercise it according to all the circumstances of each particular case; and it is not too much to say, that when, as claimed on the argument here, the cause has been nearly completed, and a cross-action has been stayed on the application of the plaintiff, on the ground that the defendant could obtain relief on the counter-claim in this action, leave to discontinue would and should be refused. It is only a question of practice, and wholly under the control of the court.

I have cited the case of *Schuschar* agt. *Reimer*, to show that as the petitioners have the right to have the action continued, they may move, as they did, under the 121st section

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of the Code. I simply desire to add, that even if that section did not authorize the making of the motion, that would present no difficulty. If the cause of action, as here survives, and the petitioners have the right of action continued, and there be no method for procuring the continuation of it expressly provided, then it would be merely an omission in the Code as to a point of practice, which the court, in the exercise of its general powers over such matters would supply and regulate. In any view, I think the order below was just and right, and should be affirmed.

The plaintiff again appealed to the court of appeals, where the orders of the supreme court were affirmed, principally upon the ground, that the defendant was an actor in the case.

Townsend agt. Ingersoll.

SUPREME COURT.

ANN W. TOWNSEND agt. PLATT C. INGERSOLL.

Where payments are made upon a promissory note, given by the defendant to the intestate in his life time, to his *widow* having possession of the note, *before* letters of administration are granted to her, on the granting of such letters subsequently to her, the doctrine of *relation*, from the death of the intestate confirms her acts made for the benefit of the estate and renders the payments thus made a *new promise* and takes the note out of the *statute of limitations*.

*Second Judicial Department, Brooklyn General Term,
May, 1872.*

Before J. F. BARNARD, P. J., J. W. GILBERT and A. B. TAPPEN, JJ.

APPEAL by defendant from judgment for plaintiff entered upon report of referee. The facts will appear in the referee's report, which is as follows :

To the Supreme Court : This cause having been, by order of this court, made April 3d, 1871, referred to me to hear and determine, I respectfully report :

That I have been attended by the parties, heard and considered their testimony, and find and decide as follows :

As matters of fact, that defendant, on the 29th day of June, 1854, made his promissory note in writing, in the words and figures following, to wit :

\$500

Elmira, June 29, 1854.

Six months from date, for value received, I promise to pay Thomas Townsend, or order, five hundred dollars, with use, on settlement to date, for Coryle Extract, &c. P. C. INGERSOLL.

and delivered the same to the said Thomas Townsend.

That thereafter, and on or about the 18th day of October,

Townsend agt. Ingersoll.

1868, the said Thomas Townsend died intestate, and that on the 24th day of October, 1870, letters of administration were granted by the surrogate of the county of New York upon his estate to the plaintiff, who duly qualified as such administratrix.

That on the date following, the following sums were paid by defendant upon the said note to the plaintiff:

On the 22d day of January, 1869, \$10; on the 1st day of March, 1869, \$15 50; on the 7th day of June, 1869; \$13; on the 11th day of August, 1869, \$5; on the 2d day of September, 1869, \$2. In all amounting to the sum of \$45 50, which, with interest thereupon to the date of this my report, amounting to eight dollars and fifty cents should be credited to defendant upon said note, and that no other payment have been made by defendant upon said note.

That said note was not given by defendant to said Thomas Townsend, deceased, as collateral security for any debt due by O. S. Gregory and defendant as copartners, or said Gregory to said Townsend, or as collateral security for the performance of any agreement upon the part of said Gregory.

That no evidence has been adduced or testimony offered before me in support of the counter-claim set up in the answer.

As a conclusion of law from the foregoing facts, I find and decide, there is due to the plaintiff from the defendant upon said note the sum of five hundred dollars, with interest thereon, from the 20th day of November, 1864, amounting to two hundred and thirty-nine 75-100 dollars, making for principle and interest the sum of seven hundred and thirty-nine 75-100 dollars less the sum of fifty-four dollars paid as aforesaid by defendant on said note, leaving a balance due by said defendant to plaintiff of six hundred and eighty-five dollars and seventy-five cents, for which sum plaintiff is entitled to judgment, with costs of this action.

September 2, 1871.

FREDERICK A. WARD,

Referee.

Townsend agt. Ingersoll.

HENRY S. BELLOW, *for defendant, appellant,*

Cited and relied on 9 N. Y., 85 ; and 8 N. Y., 362.

ANDREW GILHOOLY, *for plaintiff, respondent.*

(a.) Each of the new contracts having been made with the plaintiff, the widow of the intestate, who had possession of the note in suit, and was acting on behalf of the intestate's estate, for its benefit, before letters granted, her letters of administration will relate back in order that the estate may not lose the benefit of the contract, and thus enable the plaintiff to sue upon it in her representative capacity (*Bodger agt. Arch*, 10 *Exch.*, 333 ; *Williams on Exrs.*, 557, *Lond. Ed.*, 1866).

The distinction between the time of the vesting of the title of an executor and that of an administrator has become of no practical importance, for it is now settled beyond all question that the title of the administrator, after his appointment vests from or relates back to the death of the intestate (3 *Redf. on Wills*, 127)

Thus the administrator may recover against a wrongdoer, who has seized or converted the goods of the intestate, before letters granted, in an action of trover (*Com. Dig. Administration B.* 10 ; 18 *Vin. Abr.*, 285 ; *Rockwell agt. Saunders*, 19 *Barb.*, 473).

Or, he may bring trespass, although this is an action founded on the right to possession.

"The relation fixes the possession from the beginning" (2 *Roll. Abr.*, 554, *Tit. Trespass*, pl. 2 ; *Year Book*, 26 *Hen.*, 6, 8 ; *Tharpe agt. Stallwood*, 5 *Man. & Gr.*, 760)

The ancient reason for this relation was, that "otherwise there would be no remedy" (*Per ROLLE, Ch. J.*, *Long agt. Hebb, Style*, 341, A.D., 1652).

The principle, as deduced from the latter cases, stands upon a broader and more symmetrical basis, viz. : "The

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title of an administrator relates back to the death of the intestate, for the purpose of supporting the rights of the intestate, and of ratifying acts for the benefit of his estate, and giving a remedy where otherwise there would be none; but not to affect the rights of third persons to the estate vested intermediate the death and letters granted, or to take away those of the intestate, according to the maxim, '*in fictione juris semper consistit equitas*'" (Leber agt. Kauffell, 5 Watts & Sar., 440, 5).

In the case last cited, one who has paid a claim against an intestate's estate, and afterwards took out letters of administration, was held entitled to sue, in his representative capacity, on a bond given to the intestate to indemnify him against that claim.

So where a note belonging to the estate of an intestate was paid to his widow, who subsequently united with another in taking out letters of administration, and they then brought an action on the note in their representative capacity, the letters were held to relate back and render the payment to the widow, a bar to the action (Priest agt. Watkins, 2 Hill, 225).

While there are certain cases in which the doctrine of relation has not been allowed, yet they will be found to be those in which the fiction is set up to divest some right of a third person to the estate which vested intermediate the death of the intestate and letters granted, as *Gilb. Eq.*, 223 or to prejudice the right of the intestate, as *Morgan agt. Thomas*, (8 Exch., 302); *Murray agt. East India Co.*, (5 Barn & Al., 204); *Pratt agt. Swaine*, (8 B. & C.); *Steward agt. Edmond's*, (1 Wms. Exrs., 4th ed. 834, note u); *Parsons agt. Mayesden*, (*Freeman*, 151).

The New York decisions proceed on the doctrine of the earlier English cases, and of *Williams agt. Norwith*, (*Style*, 337), and hold that the grant of letters of administration relates back to the death of the intestate, and legalizes all intermediate acts of the administratrix *ab initio*, whether

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beneficial to the estate or otherwise, in the absence of fraud or collusion (*Vroom* agt. *Van Horne*, 10 *Paige*, 549, 558; *Rattoon* agt. *Overacker*, 8 *Johns.*, 226)

(b.) Even if the payments on account of the defendant's indebtedness to the intestate had been made by the defendant to a third person holding the note, and been received as such, under the same circumstances as those of January 22, 1869, and August 11, 1869, were made, the act of such third person could have been ratified by the plaintiff after letters granted, and the new promise, raised by the payments, been rendered available to the plaintiff as administratrix.

The act would have been ratified by making a legal demand for the benefit of the contract thus made, by bringing suit (1 *Am. Lead. Cas.*, *Hare & W.* notes, 593), and where one means to act as agent for another a subsequent ratification by the other is always equivalent to a prior command; nor is it any objection that the intended principal was unknown at the time (*Hull* agt. *Pickersgill*, 1 *Brod. & Bina.*, 282; *Foster* agt. *Bates*, 12 *M & W.*, 226).

So where one received sums of money from an intestate's debtors' the subsequently appointed administratrix was held entitled to waive the tort, ratify the receipt of the money and recover the same in an action for money had and received to her use as administratrix (*Welchman* agt. *Sturgis*, 13 *Q. B.*, 552).

The administrator may ratify a contract made by procurement, or in any other form, before his appointment on behalf of the estate, so as to take the benefit of it, the same as if his authority had been of a date anterior (3 *Redf. on Wills.*, 127).

(c.) The provisions of the Revised Statutes (2 *R. S.*, § 61, § 60, and *Id.*, 449, § 17), were not intended to work any alteration in the common law in respect to the doctrine of the relation of letters of administration (*Priest* agt. *Watkins*, 2 *Hill*, 226).

At common law if one who was neither executor or ad-

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ministrator intermeddled with the goods of the deceased, or did any act characteristic of the office of executor, he thereby made himself an executor of his own wrong or *de son tort* (*Swinburne*, part 4, § 23, pl. 1; *Godolph*, part 2, ch. 8 § 1; *Wentworth*, *Off. Exrs.*, 14th ed. ch., 14, p. 320).

When one so acted as to become executor *de son tort* he thereby rendered himself liable not only to an action by the rightful executor or administrator, but also to be used as executor by the creditor of the deceased or by a legatee, for an executor *de son tort* had all the liabilities though none of the privileges, that belong to the character of executor (*Carmichael* agt. *Carmichael*, 1 *Phil. E. C.*, 103, per Lord COTTENHAM; *Williams on Exrs.*, 217; 2 *Blacks. Com.* 495.)

He could not bring an action himself in the right of the deceased (*Bro. Abr. Tit. Administration*, 8), so that even at common law the plaintiff in this action could not be heard as executrix *de son tort*.

He was chargeable with the debts of the deceased, so far as assets came to his hands (*Dyer*, 166), and as against creditors in general was allowed all payments made to any other creditor (1 *Ch. Ca.*, 33), himself excepted (5 *Rep.* 30, *Moore*, 527).

By statute, (2 *R. L.*, p. 313, § 13, copied from 43 *Eliz.*, Ch 8, 1 *Chitty St.*, 3d ed., 1416), an executor of his own wrong was declared liable for all assets coming to his hands, with the privilege of retaining for debts due him from the intestate, and of being allowed for all proper payments made by him. 2 *R. S.*, 81, § 60, deprived him of this statutory privilege.

2 *R. S.*, 449, § 17, abolished the common law liability, and rendered him responsible as a wrongdoer to the lawful representative of the estate.

The sole intention was manifestly to alter the theory of the liability of third persons to the rightful executor or administrator for their wrongful acts, and to restrict this liability to such executor or administrator, as trustee not only of the

Prudden agt. City of Lockport.

SUPREME COURT.

LEWIS PRUDDEN agt. THE CITY OF LOCKPORT.

Where a summons and complaint were issued against the city of Lockport to recover a liquidated specified sum, for services as police constable, an allegation in the complaint that the defendant neglected and failed to keep the means in the hands of its treasurer to pay said account, and that there was no funds in his hands out of which he could properly pay said order, did not make the cause of action in the complaint a *tort* for negligence.

Consequently, there was no variance between the summons and complaint; both were for a money demand on contract.

Niagara Special Term, September, 1870.

MOTION by the defendant to set aside complaint, on account of variance from the summons. The summons contains a notice that the plaintiff will, in default of an answer, take judgment for the sum of \$61 62 and interest from March 16, 1870. The complaint demands judgment for the same sum stated in the summons. The alleged cause of action is for services rendered by one Patrick H. Sullivan, as one of the police constables of the city of Lockport. The complaint alleges the performance of services as such officer, the auditing of the account by the common council at \$61 62, and the drawing of an order therefor on the city treasurer, signed by the mayor and clerk, and in the following form :

"\$61 62.

No. 2160.

"Treasurer and tax receiver of the city of Lockport:

"Pay Patrick H. Sullivan or order sixty-one 62-100 dollars out of the general fund, being for services as policeman to March 20, Dated Lockport, March 14, 1870.

"ALBERT F. BROWN, *Mayor*.

"C. STACEY MACK, *City Clerk*."

Prudden agt. City of Lockport.

That such order was, on the 16th of March, 1870, presented for payment, and payment was refused by the treasurer for want of funds. The complaint then alleges that the defendant neglected and failed to keep the means in the hands of its treasurer to pay said account, and that there was no funds in his hands out of which he could properly pay said order. That the claim against the defendant had been assigned to the plaintiff.

JAMES F. FITTS, *for motion.*

D. MILLAR, *opposed.*

PARKER, J.—The charter incorporating "the city of Lockport" provides for an officer named police constable, defines his duties, fixes his salary and time of payment. It is also provided that the common council should have power to cause to be raised by tax a sum annually not exceeding \$16,000, and that the greater part of this sum is to be paid to the city treasurer, for the payment of the salaries of the officers of said corporation, as in the charter provided, and for the contingent expenses of the city.

The defendant bases his motion upon the ground that the cause of action contained in the complaint is one of tort, and is founded wholly upon the negligence of the defendant in not keeping its treasurer in funds to discharge this debt.

The position is wholly unsupported by every possible view that can be given the case.

The sum earned by the policeman, is a debt against the defendant in its corporate capacity. By the terms of the charter, the money to be raised for its payment is assessed upon all the taxable property of the city; the services to be rendered by this officer are for the common benefit of all the residents and taxpayers. The compensation to the city officers, including policemen, are not made payable out of any particular fund, nor upon any condition or limitation whatever.

Prudden agt. City of Lockport.

Municipal, like other incorporations, are liable to suits to enforce the payment of its debts and other liabilities. In cases where the municipal corporation, by its charter, is charged with the duty of deciding upon making local improvements within its corporate limits, and acts as the agent of the party injured and the party benefited, in distributing and assessing the costs of the improvements, and fails through the negligence of its officers, to take the necessary steps to levy the assessment, or to collect the tax, then it is liable in an action of tort, and the negligence of its officers to discharge an official duty is the basis of the action. In this class of cases, there is no debt created against the corporation; the labor and improvement is not done for the benefit of the corporation, but in the interest and for the benefit of a part only of the corporators. The following cases are of this character, part of which were cited by the defendant's counsel: *McCulloch* agt. *The Mayor of B.*, 23 *Wend.*, 418; *Lake* agt. *The Trustees of the Village of W.*, 4 *Denio*, 520; *Beard* agt. *The City of Brooklyn*, 31 *Barb.*, 142.

The plaintiff's right of action is founded upon a contract, and the summons contained the proper notice, that, if the defendant failed to answer he would take judgment for a definite sum of money.

The motion is denied, with \$10 costs.

The acts of the legislature relating to the city of Lockport, are chapter 365, laws of 1865, chapter 809, laws of 1868, chapter 835, laws of 1869.

Brink agt. Gould.

SUPREME COURT.

ADELAIDE BRINK, respondent, agt. JOEL GOULD appellant.

It is essential to the parol gift of personal property, in order to pass the title, that it be *delivered*. A mere intention, or naked promise to give, without some act to pass the property, is not a gift. The donor must not only part with the possession, but with the dominion of the property. And the gift is only perfect and irrevocable by *delivery and acceptance*.

In this case, there was no such delivery of the property (a heifer) to the plaintiff by her mother, as the law requires to establish a lawful gift.

Elmira General Term, May, 1872.

MILLER, P. J. POTTER and PARKER, JJ.

THIS action was brought in a justice's court to recover the value of a cow, which plaintiff claims was wrongfully and unlawfully taken by the defendant.

The defendant denies every allegation of the complaint, also denies the plaintiff being the owner of said cow, or having the right of possession. The answer also alleges that he came rightfully in possession of said cow, by virtue of a mortgage given by James B. Brace, plaintiff's father, to James B. Balch, and that afterwards the said James B. Brace, who had a right so to do, and at the time of the pretended conversion did sell and deliver the said cow by agreement to pay the said mortgage.

And that if the plaintiff ever had any property in said cow, she had full knowledge of the mortgaging of said cow to James B. Balch by her father, James B. Brace, and by various acts had acknowledged the right of Brace to control and mortgage said cow, and had approved and ratified the mortgaging of said cow by having full knowledge of the fact, and in

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terposing no objections, and by giving no notice of her claim, if any existed.

The case was tried before the justice and a jury, and a verdict rendered in favor of the plaintiff. The defendant appealed from the judgment to the county court of Tioga county, and upon a retrial then a verdict was found in favor of the plaintiff for \$74 90. At the close of plaintiff's testimony, a motion was made for a nonsuit upon the ground among others, that there was no valid gift of the property to the plaintiff, which motion was denied, and the defendant duly excepted. Four other questions were raised upon the trial, but it is not important to state them. The material feature is set forth with sufficient particularity in the opinion. A judgment was entered on the verdict, a motion was made for a new trial, and denied by the county court, and the defendant appealed to the general term of the supreme court.

CHARLES A. CLARK, *for appellant and defendant.*

I. To maintain trover, or any action for the conversion of personal property: The plaintiff must have property in the chattels converted and the actual possession, or the right to the possession, at the time of the conversion.

And if the defendant denies property in the plaintiff: Under such a denial, the defendant may show property out of the plaintiff and in himself, or in a third person. Such proof will defeat the action (*Morey agt. Safe Deposit Co.*, 39 *How.*, 124; *Tuthill agt. Wheeler*, 6 *Barb.*, 362; *Hatchkiss agt. McVickar* 12 *Johns.*, 403; *Heyl agt. Burling*, 1 *Caines*, 14).

II. The heifer or cow in controversy was not the property of the plaintiff at the time the defendant took possession of her, January 30th, 1869. Neither had she been at any time the property of the plaintiff, nor in her possession.

The plaintiff claims the heifer as a gift from her mother,

Brink agt. Gould.

which gift consisted in a conversation which she and her mother allege took place in February, 1867, concerning the giving the plaintiff a heifer by the mother. Two heifers were mentioned; neither was designated. Neither was accepted at the time. The heifer was not seen at the time, nor is there any recollection when she was seen afterwards. There never was any delivery of the heifer to the plaintiff, and there was never any change of possession until she was delivered by James B. Brace, on the 30th of January, 1869, to the defendant. The heifer continued to be kept with her father's stock as before. James B. Brace raised this heifer from a calf, furnished fodder for her, and at all times exercised acts of ownership over her, had the possession and control of her, and it nowhere appears that he had any knowledge of this pretended gift from his wife to his daughter, the plaintiff, until January 30th, 1869.

At the time of this conversation purporting to amount to a gift of this heifer, the plaintiff was living away from home teaching school. Yet the heifer was not seen. No change was made in the possession; no different arrangement concerning her keeping, and it nowhere appears that this heifer being given to plaintiff was ever mentioned, between donee and donor, or to other parties from the time when this conversation is pretended to have taken place in February, 1867, up to the time when Brace was delivering up this heifer in accordance with his *bona fide* sale on the 30th of January, 1869.

The plaintiff married and went away from home to live, and the heifer remains in the same possession. Nothing is mentioned that she had any claim to the heifer anywhere, nor at anytime, nor to any party. Her husband did not know that she had any claim on the heifer. They moved to Nanticoke and live in the same house with her father; but by themselves, each furnishing their own table. This heifer becomes a cow and gives milk, the milk is never separate from the milk of the other cows belonging to her father, but

Brink agt. Gould.

is all put together with the milk of the other cows, and this continued so up to the time defendant came in possession of this cow, and this mysterious gift appears not to have been thought of during all this time.

It is essential to the validity of a gift that it goes into effect immediately and completely. If it is to take effect in future, it is a mere promise; and since it is a promise made without any consideration to support it, the law will not enforce it. For this reason it is indispensable that every oral gift to be valid should be accompanied by an actual or symbolical delivery of the thing given if the subject matter is capable of delivery.

If the possession, or some means of obtaining the possession and control is not transferred to the donee, the title does not pass (1 *Wait*, 109; 11 *Wait*, 1013, note 14; *Noble agt. Smith and others*, 2 *Johns.*, 52; *Cook agt. Sarah Husted*, 12 *Johns.*, 188; *Huntington agt. Gilmore*, 14 *Barb.*, 243; *Woodruff agt. Cook*, 25 *Barb.*, 505; 2 *Kent's Com.*, 438; *last ed.*, 2 *Kent*, 566).

In this case the court will perceive that the evidence is complete and positive by the plaintiff, the pretended donee, and by her mother, the pretended donor, that there was never any delivery of this heifer to the plaintiff, and never a change of possession. This is from plaintiff's own witnesses, and stands entirely undisputed; that the plaintiff did not in any manner ever have any control over this cow. The question which defendant thinks should be decided is, "Is any delivery whatever necessary to constitute a valid gift?" or "can a valid gift be made without designating what the property is, or which of different pieces of property is to be given, without pointing it out, without seeing it, and without even receiving possession or control of the property in any manner whatever?" And the opinion of the court is respectfully asked.

III. If Irena Brace, the mother of plaintiff, was originally the owner of this heifer or cow, she continued to own it as the

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possession, title and control were not changed in consequence of the pretended gift. The mortgage given by Brace, and the sale made by him was binding upon her. 1st. Brace told her at the time of borrowing the money of defendant, he got the money to pay company debts with, of which she owed a part. 2d. She knew of the mortgaging of this cow, and made no objection. 3d. Brace was her authorized agent, and did the business for the firm. If there was money to be borrowed, or to be paid, he did it. 4th. She was present at the time of the delivery of this heifer, and made no objection to the sale and delivery. This cow was delivered to defendant by an arrangement made with James B. Brace. Brace stated to Almon Morgan when he turned this heifer out to him as security on a former occasion, in the presence of Mrs. Brace that this heifer was his, and she assented to it by not disputing it. The sale and mortgage by Brace was a sale by the wife if she was the owner of the property. She was cognizant of the whole transaction and approved and ratified it. Now, when Brace borrowed the money of defendant and mortgaged this heifer to secure Balch for signing with him, he was doing just such business as Mrs. Brace swears he was authorized to do for the firm: to borrow money when necessary, and to pay it out. The mother had never delivered this heifer to plaintiff, and after selling it through James B. Brace, her agent, to Balch, or to defendant, she can't now trump up some old conversation between her and her daughter, to deprive an innocent purchaser in good faith of his rights, and thus defraud him of his money (*Cairner agt. Bleecker*, 12 *Johns.*, 300; *Johnson agt. Jones*, 4 *Barb.*, 369; *Thompson agt. Blanchard*, 4 *Comst.*, 303; *Niven agt. Belknap*, 2 *Johns.*, 573 and 599; *Brewster agt. Baker*, 16 *Barb.*, 613; *Stephens agt. Baird*, 9 *Cow.*, 274; *Edgerton agt. Thomas*, 5 *Seldon*, 40).

IV. The plaintiff had knowledge of this mortgage, and if she had any claim to this cow, she legally assented to the

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mortgage (12 *Johns*, 300; *Thompson agt. Blanchard*, 4 *Comst.*, 303; *Brewster agt. Baker*, 16 *Barb.*, 613).

Every ratification of an assumed agency is equivalent to an original authority (*Tracy agt. Veeder*, 35 *How.*, 209).

V. The defendant had a right to the answer to the question put to Theodore Brink, plaintiff's husband, on a cross-examination: "Did you not in December, 1868, make a contract with James B. Brace, by which you were to have this cow of him?"

The defendant had a right upon cross-examination to show that the plaintiff's husband eight months after the mortgage was given on this cow, and only the month before she was delivered up to pay the mortgage, and after the whole family, plaintiff and all, knew of the existence of the mortgage, supposed the title to be in Brace instead of his wife, the plaintiff. It would show that after this cow had been milked through the season, that plaintiff's husband considered the title and the possession, and the right to dispose of this cow in Brace.

This right the defendant was denied by the court, to which the defendant excepted.

And yet, after denying the defendant the answer to this question, the learned judge charged the jury to take into account any acts of ownership or control exercised by the plaintiff, or by her husband for her, in determining whether this cow had been delivered to the plaintiff.

And although the only claim made that there was ever a delivery to the plaintiff, by plaintiff's counsel, and the only claim that the plaintiff ever had any possession or property in this cow, was based on the ground that her husband, the witness, made a contract with James B. Brace, and became a partner in Nanticoke with James B. & Irena Brace, and by virtue of this partnership the husband of plaintiff came in possession of the premises on which the stock was kept equally with J. B. Brace & Irena Brace, and that his possession of the real estate, thus obtained, unwittingly and

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without knowledge, thought or intent, completed this pretended gift. And yet, defendant was denied the privilege of proving by this husband, whom plaintiff produced as a witness, that he knew that Brace had either the ownership or right to sell and dispose of this cow. And that if witness (plaintiff's husband), ever had any possession it was under a contract from James B. Brace, and that plaintiff, by no act, word or deed of hers had ever indicated that she had ever had any present from her mother, and that she had never communicated to her husband that she claimed this heifer, which would be strong presumptive evidence that she did not consider it hers.

VI. The court should have granted a nonsuit on motion of defendant.

From plaintiff's own evidence the cow in question was shown not to be the property of plaintiff. She was shown never to have possession, or the right of possession, and there was no fact, with which the plaintiff should have been allowed to go to the jury (*Huntington agt. Gilmore*, 14 Barb., 243).

VII. The judge's charge to the jury was conclusive against the defendant, and the defendant's rights were prejudiced thereby. The charge left no fact for the jury to determine, it in fact ordered the jury to find a verdict for the plaintiff. The charge necessarily carried to the minds of the jury, that his honor, the judge, had determined that there had been, at some time and in some manner, a delivery to the plaintiff of this heifer. He charged the jury, "that the gift of this cow became complete, and that the title was in the plaintiff." This left no fact for the jury to determine, and to this charge the defendant duly excepted.

He also charged the jury, "that unless the mortgage was given by the consent and approval of the plaintiff, they would find as damages for the plaintiff, the value of the cow," &c. To which the defendant duly excepted.

This instructed the jury to find a verdict for the plaintiff,

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even if the plaintiff was not the owner, nor had any right to possession, if the mortgage had not been given by her consent and approval she was entitled to a verdict according to the charge. And if she was the owner, and after the mortgage was given, ratified the act, still, according to the charge, the jury were instructed to give the plaintiff a verdict.

He also charged the jury that acts of ownership, or control, exercised by the plaintiff's husband were to be taken into account in determining the completion of this gift, to which the defendant duly excepted.

There was no foundation in the evidence for such a charge.

The evidence amounts to positive proof on the part of the plaintiff that there was at no time a delivery of this heifer to the plaintiff, nor to any one else, for there was no change of possession (2 *Kent's Com.*, 438; *last ed.*, 2 *Kent.*, 566).

Therefore, the plaintiff's husband could not have had possession of her, nor the plaintiff. And there is not the slightest particle of evidence in the case tending to show any delivery or change of possession.

The charge was unjust and prejudicial to the defendant and controlled the verdict of the jury (3 *Abb. N. S.*, 286).

The judgment should be reversed with cost, as a new trial would be no benefit to the plaintiff.

CHARLES A. MUNGER, *for respondent and plaintiff.*

I. The jury found the gift complete, and there is evidence to sustain their finding.

The plaintiff swears that in February 1867, her mother gave her the heifer, telling her she could have whichever of the two she wanted; that in 1868, she milked the cow; that in January 1869, she was the owner of the cow, and asserted her ownership, and forbade the taking.

Mrs. Brace swears that she gave the animal to the plaintiff; was present when she asserted her claim and forbade the taking, and that Brink, herself and Brace lived together

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on the farm when the cow was taken, and were in partnership in the business of farming. Mrs. Brace recognizes the gift and makes no claim to the animal.

Mr. Brink, the husband of plaintiff, was present at the taking, when his wife claimed the cow, and afterwards by her direction demanded the animal of the defendant; and from his evidence it may be inferred that after April 1867, his wife claimed the heifer, and that he drove the heifer to bull in June, 1867.

It would seem that from the time of, or shortly after the gift in February 1867, this animal was recognized and treated as the plaintiff's property up to the occasion of the conversion—and will a party who makes no claim through either the donor or donee be permitted to question the validity of the gift?

II. Although delivery is essential to a gift, yet, as the daughter was at the time teaching school away from home, and as after her marriage, with the exception of two months, she and her husband lived with her parents, a sufficient, and all the delivery the property was susceptible of, may be inferred.

Mrs. Brace recognized and never revoked the gift. Her daughter accepted and claimed it. The donee and her husband exercised acts of ownership over the cow. After March 1867, the plaintiff and her husband were in joint occupation, with Mr. and Mrs. Brace, of the farm on which the cow was kept, and Brink was a partner with Mr. and Mrs. Brace in the farming business.

When a father bought a lottery ticket which he declared he gave to his infant daughter, and wrote her name upon it, and after it had drawn a prize declared that he had given it to her, and that the prize money was hers—this was held sufficient for a jury to infer all the formality requisite to a valid gift (*Grangiac agt. Arden*, 10 *Johns.*, 292).

A man and woman lived in the same boarding-house, and he maintained and treated her as a daughter, and both had

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access to a room in which he had a trunk. Being about to go away, and being in another room, he said to her: "My trunk upstairs and what is in it, I give to you—there is enough in it to keep you a spell." He went away and returned in a few days and occupied the room and used the trunk and clothes as usual, and until he died, shortly after. The woman then took the trunk and contents, among which was a pass book in a savings bank. WOODRUFF, *J.*, held this a valid gift of the book, and of the moneys standing to the decedent's credit therein, and that a delivery and acceptance might be inferred from the facts (*Penfield agt. Pub. Admr.*, 2 *E. D. Smith*, 305).

III. The jury having found, as they well might find, that Mrs. Brace knew nothing of the mortgage until the summer after it was given, and the plaintiff nothing until some two weeks before the taking, the defendant is concluded on that point. He derived no right through either mother or daughter.

Now, as Brink and wife, and Brace and wife, together occupied the farm where the animal was kept, and as Brink did not claim her—as Mrs. Brink, the former owner, recognized the cow as the plaintiff's, and as at the time of the conversion the plaintiff claimed and exercised acts of ownership over her, the plaintiff had such a possession as would entitle her to maintain trover even if the gift had never become complete.

A naked possessor of goods without right may maintain an action of trover, and if property be set up by a third person, it must be followed by proof of some right or claim derived by the defendant from the true owner (1 *Cow. Tr.*, 3d ed., 321, and cases cited).

IV. The charge of the judge is unexceptionable. The expression of the judge; "It seems to me the gift became complete," taken in its proper connection, did not amount to an instruction to the jury on a point of law. It was a mere expression of an opinion that the evidence did show a transfer of possession, and he in no respect assumed to take from

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the jury the right to judge for themselves on the matter. A mere expression of an opinion by a judge upon the evidence, leaving the jury to draw their own conclusions, is never a ground for a new trial (*Johnson agt. Packard*, 6 W. 415; *Winne agt. McDonald*, 39 N. Y., 232).

By the court, MILLER, P. J.—Delivery is essential to the validity of a parol gift. Without a delivery, title does not pass, and a mere intention or naked promise to give, without some act to pass the property, is not a gift (2 *Kent Com.*, 438). The donor must part not only with the possession, but with the dominion of the property (2 *Kent Com.*, 439). And the gift is only perfect and irrevocable by delivery and acceptance (2 *Kent Com.*, 440, see also *Grangiac agt. Arden*, 10 *Johns.*, 296; *Huntington agt. Gilmore*, 14 *Barb.*, 246; *Woodruff agt. Cook*, 25 *Barb.*, 512; *Harris agt. Clark*, 3 *Com.*, 113).

The principles laid down are quite familiar and applying them to the facts presented in the case at bar, I am unable to see how the plaintiff can recover, and am inclined to think that the court were in error in refusing the motion made by the defendant for a nonsuit. The plaintiff claimed the property as a gift from her mother, and it appeared upon the trial, that the plaintiff's mother was the owner of the two heifers, and that in the month of February, 1867, in a conversation with the plaintiff at the mother's residence where the heifers were, she told the plaintiff that she could have whichever one of the heifers she wanted. No response was made to this. The heifers were not present, and no designation was made by the plaintiff of either of them, at that time. The plaintiff did not live at home, but was away teaching school, and did no act to take possession of the heifer. The plaintiff neither received nor did her mother deliver the property to her at the time the alleged gift is claimed to have been made. There was no such acceptance and delivery as the law requires.

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The subsequent acts do not, in my opinion establish, or tend to prove any facts which obviate the difficulty. The plaintiff was soon afterwards married, and in the month of March following, her husband and father and mother, made a contract for a farm, to which the father and mother removed with the two heifers and other stock which had remained in their possession, and about the first of April the plaintiff and her husband also went there. The farm was then worked by the plaintiff's husband and her father and mother jointly, and in April, 1868, the plaintiff's father executed a chattel mortgage upon the heifer and other property under which the defendant claims title, and took the same in the month of January, 1869. During the period that the plaintiff and her husband were in possession of the farm with her father and mother, she exercised no distinct act of ownership over the property, nor made any especial claim of title, to wit: It was these the same as other stock, and there is no evidence of a delivery of the property to her alone. Certainly there was no such delivery, as the law requires to establish a gift within the meaning of the law. There is in fact, nothing in the case to show any change in the possession of the property after the alleged gift, except the fact that the plaintiff and her husband worked the farm in conjunction with her father and mother. This is not sufficient to make out a valid gift, or to raise any question of fact for the jury upon that subject.

Four other questions are made, but inasmuch as there was error for the reasons stated, in refusing the motion for a nonsuit, it is not necessary to discuss them.

Judgment and order appealed from reversed, and a new trial granted with costs to abide the event.

The steamer Patapsco.

U. S. SUPREME COURT.

THE STEAMER PATAPSCO.

1. The steamer Patapsco, a vessel owned or chartered by the Commercial Steamboat Company, a corporation incorporated by the laws of Rhode Island, was engaged in making weekly trips between New York and Baltimore in a line with other vessels belonging to the company.

On each occasion that she started from Baltimore the agent of the company gave written requisitions to Mr. Boyce, a coal miner, who had extensive coal depots at Baltimore, to deliver on board of the steamer (by name) various quantities of coal. Mr. Boyce on receiving the above requisitions gave written orders to his agents to deliver on board of the steamer (by name) the same quantities.

The coal was necessary, indeed indispensable to enable the steamer to make her various voyages. To save useless accumulation of bills, Mr. Boyce tendered one general bill each month to the company (by name) making them debtor to the various accounts. The steamer had no funds to pay for the coal and the company were in an embarrassed state which shortly thereafter resulted in total bankruptcy.

On a libel filed *in rem* by Mr. Boyce against one of the steamships for coal used, it was *held* by the United States district court of New York, (SHIPMAN, D. J.) that he had no lien on the steamship for the coal. The United States circuit court, (NELSON, C. J.,) reversed the district and *held* that he had and the supreme court now affirm the circuit court holding:

1. That it appearing that the Patapsco was in a foreign port and that the coal was ordered for her *specifically by name* and delivered to the officers in charge of her; that the coal was necessary, in such a case the inference is that the credit was given to the vessel, unless it can be inferred that the master had funds, or the owners had credit and that the material man knew of this, or knew of such facts as should have put him on inquiry.
2. The *Lulu* (10 *Wal.*, 192), alluded to and approved of.
3. The coal being sold for cash at the lowest market price, it is clear that there was no credit given to the company at the time of sale.
4. When the libellant waived his privilege of cash on delivery and put the coal on board of the steamship, the presumption of law would be that he thereby gave credit to the steamship and not to the owners thereof, inasmuch as the supplies were furnished in a foreign port.
5. If the credit was to the vessel there is a lien and the burden of displacing it is on the claimant.
6. He must show affirmatively that the credit was given to the company to the exclusion of a credit to the vessel.
7. Entries in the books of the party supplying the materials, while they may tend

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to support either view of the facts of credit according to the entry, yet are not conclusive, and are always explainable, and the truth of the transaction can be shown independent of them.

8. The recent decisions of the supreme court in cases of liens sought to be enforced by material men, for supplies furnished to vessels in foreign ports, have had the effect to place liens on a more substantial footing than some previous cases seem have left it.

Argued March 21, 1872, decided May 6, 1872.

AN appeal from the second circuit.

This case came up on appeal from a decree of Mr. Justice NELSON, delivered in the second circuit, reversing a judgment rendered in the U. S. district court for the southern district of New York.

In the district court below, the libellant, a resident of Baltimore, had filed his libel and arrested the Patapsco, a vessel owned or chartered by the Commercial Steamboat Company, a corporation incorporated by the laws of the state of Rhode Island, for coal furnished the said steamboat at Baltimore, in February and March, 1866, to enable her to make her trips between Baltimore and New York, between which ports she was running, under a charter to and in the line of the said company. At that time the title to the vessel was registered in the N. Y. Custom House, in the individual name of Bacon, who was president of the company, and a resident of New York, and so remained until April 2, 1866, (but she was controled solely by the company, on or about which date a bill of sale of her was executed by Bacon to the present claimant, Borland, also a resident of New York; the bill of sale expressing a consideration of \$15,000, but as appears by a letter dated April 27, 1866, written by Borland to the libellant, the actual consideration was a claim which Borland held on the vessel amounting to \$10,500, and in practical effect he only held the title as security.

The proofs in the district court below, also established that the supplies in question consisted of six separate deliveries of bituminous coal by the appellant, on board of the Patapsco, on the following dates, viz :

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1866, Feb,	3—40 tons	7 10	284 00
“ “	10—41 “	7 10	291 10
“ “	17—50 “	7 10	355 00
“ “	26—50 “	7 00	350 00
“ Mch.	14—25 “	6 50	162 50
“ “	24—42 “	6 50	213 00
			<hr/>
			\$1,715 60

It also established that the said supplies were used in the service of the vessel to enable her to make her trips in the line, and were, therefore, necessities. That at the time the said coal was furnished, the owners of said vessel, the Commercial Steamboat Company, had no other coal at Baltimore, (the port of supply), by which the vessel in question, the Patapsco, could have been supplied for her said trips independent of the coal purchased of Mr. Boyce. And during February and March, 1866, the owners purchased coal of no other person for the said vessel than of Mr. Boyce.

The proofs in the district court below, also established that the supplies in question were ordered by the owners of the line, through their Baltimore agent who had authority for that purpose.

The course of dealing was as follows, viz: the engineers of the different steamships of the company, on their arrival at Baltimore, reported to the agent of the company, what coal or supplies they needed for the particular vessel, whereupon he filled up a printed circular directed to Mr. Boyce (or his deputy did so in his, the agent's, name), to furnish steamship Patapsco, or whichever one it might be, so many tons of soft coal at the time when same was needed, and send invoice therefor. Mr. Boyce then filled up a printed order, in substance directing his agent, to deliver on board steamship Patapsco, so many tons of bituminous coal. On receipt of that order the coal was so delivered on board of the steamship, and vouchers for such delivery taken. At the end of the month a bill was made out of all the deliveries for that

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month to the Commercial Steamboat Company, in which the coal delivered during the month is charged to each steamboat, and the bills of coal collected. The object of making out a general bill in that form each month was, as testified to, to save useless accumulation of bills, and for sake of convenience.

The libellant also gave evidence that the coal was sold at the lowest cash price, and that the only credit given was the waiver of the cash on delivery, and rendition of a general bill at the end of the month.

The libellant further gave evidence to show that at the time the coal was sold and delivered by Boyce to the steamship, the company was more or less pecuniarily embarrassed in Baltimore, and that Mr. Boyce knew it.

This was contested by the claimants, however.

The claimants called for the libellant's journals and ledgers, but did not call for his books of original entries. The entries affecting those items of accounts are quoted in Justice DAVIS's opinion hereafter.

The libellant further proved that prior to February, 1866, the Commercial Steamboat Company were compelled to give mortgages on their steamships to the Baltimore & Ohio Railroad Company, on the 6th day of February, 1866, to secure \$45,000, the amount of freights. All of this coal was sold after that date.

The libellant further proved, that on the 10th April, 1866, the property of the company, including its steamships (but not the Patapsco), were attached on claims amounting to \$132,000 and upwards, in existence in and prior to February, 1866, many of which attachments were for mechanics' liens *in rem.*, and they were finally sold on the 30th June, 1866, and brought not enough to pay those attachments; and since January, 1866, not a dollar of principal or dividend has ever been paid on the capital stock of the company.

The steamer Patapsco.

The cause was argued before the district court of the U. S., for the southern district of New York, by

DENNIS McMAHON, *for libellant.*

CHARLES DONAHUE, and A. J. HEATH, *for claimant.*

SHIPMAN, D. J., dismissed the libel, delivering the following opinion :

SHIPMAN, J.—This is a suit *in rem*, to enforce an alleged lien on the steamer Patapsco, for coal furnished her in the months of February and March, 1866, by the libellant at Baltimore.

It is insisted that the coal was a part of the necessary supplies of the vessel furnished at that port, and that it was furnished on the credit of the vessel.

Of the necessity of the coal there can be no doubt. The question in dispute is whether it was furnished on the credit of the vessel.

The steamer was owned by John R. Bacon, at the time the article was furnished, but was running in a line owned by the Commercial Steamboat Company, a corporation chartered by the legislature of Rhode Island. This company had an office in New York, and ran their boat between that city and Baltimore. They had exclusive control of the Patapsco as well as other boats of their line, and must be deemed, for the time owners *pro hac vice*.

This company had an agent in Baltimore, who attended to their business there, including the purchase of the necessary supplies for the steamers which were required at that port.

The steamers, several in number, had been running on this line for several months and the agent had been in the habit of purchasing coal for them of different parties, and among others of this libellant. The amount of coal required for each vessel from time to time was ordered by the company's agent, in writing, the order in each instance designa-

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ting to which ship the amount called for was to be delivered. The sales were considered to be cash, but payment on delivery was waived and the bills presented monthly, to the company's agent.

This was done as a matter of convenience and to avoid the multiplication of bills.

Purchases of coal had been made of the libellant from time to time, from December 1865 down to March 24, 1866, the date of the last charge in the account upon which this suit is brought. They were all paid by the agent up to February 1. The bills were made out to the Commercial Steamboat Company, but designating the name of the ship to which each parcel was delivered. That delivered in February and March was not paid for, and the libellant seeks to charge the ship.

Now, in order to do this, the libellant must prove that this coal was furnished on the credit of the ship, and that there was an apparent necessity for resorting to that credit. I think the proof fails on both these points. The libellant dealt not with the master of the vessel, but with the accredited agent of the company, resident in Baltimore. I think that it is clear, that he looked to the company generally and not to the particular ship for his pay. Again, there is no satisfactory proof of a necessity apparent at the time for resorting to the credit of the ship. There is proof that the affairs of the company were, in fact, in a state of embarrassment, and approaching the crisis of insolvency. But the proof fails to show that they had not sufficient credit in Baltimore to obtain supplies required for their ships at that port.

That fact must be clearly proved before this court can assume, that the credit of each ship was or could be resorted to in order to obtain the supplies furnished to such vessel.

The facts in this case, if not exactly the reverse, fall far short of those in the case of *Ross* agt. *The Steamboat Never-vink*, where I held the boat liable.

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As I discussed the general question of law involved upon principle and authority in the latter case, I do not feel called upon to repeat or enlarge upon that discussion here.

Let an order be entered dismissing the libel, with costs.

From that decree the libellant took an appeal to the circuit court, and the cause was heard before his honor SAMUEL NELSON, associate justice, and was argued by

DENNIS McMAHON, *for the libellant, and*
CHARLES DONAHUE, *for the claimant.*

After advisement Justice NELSON, reversed the district court, and decreed in favor of the libellant, giving the following opinion:

NELSON, C. J.—The bill in this case was filed to recover for supplies of coal furnished in the months of February and March, 1866, at Baltimore, to the steamship Patapsco. The only question in the case is, whether or not the coal was furnished on the credit of the vessel, or of the owners, The Commercial Steamboat Company, which run a line of steamers from the city of New York to Baltimore, and occasionally from thence to Charleston. The arrangement was, that the coal should be furnished on the requisition of the engineers of the vessel for cash, but for convenience in making out the bills and transacting the business, they were made out against the vessel once a month and presented for payment. The weight of the evidence is, that Boyce in this arrangement, and time taken to make out and present the bills, looked to the vessel as security in the meantime for the payment of them, and did not intend thereby to rely on the credit of the company. The company was a corporation under the laws of the state of Rhode Island, and, of course, not accessible to him, a resident doing business in Baltimore.

The company had not long been engaged in running this

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line of steamers, and had no established credit in that city, and in the months of February and March, when the present supplies were furnished, its credit was not good. Previous to this time, it had been heavily indebted to the Baltimore and Ohio railroad company.

I think the coal in this case, under the circumstances, was delivered and the credit given to the vessel during the interval taken by the common consent and usage of the parties within which to make up the monthly bills, and present them for payment, and that the indebtedness is properly enforceable as a lien upon the vessel against which it was charged.

Decree below reversed, and decree for libellant, with reference.

On that decision a reference was had, and the commissioner reported in favor of the libellant for \$1,982 01. To which report exceptions were filed, but after argument the same were overruled and final decree rendered in favor of the libellant for said amount, and interest from July 15, 1868, date of the report, and for costs to be taxed in the district and the circuit courts.

From such decree appeal was taken to the supreme court of the United States, and after a motion was made to dismiss the appeal, which was denied, and is reported in 12 *Wal.*, the cause was heard in the December term, 1871.

CHARLES DONAHUE, *for the appellants and claimants of the steamer.*

I. The claim sought to be enforced here, is nothing short of a running account between a vender and not the owner of the boat, or any one boat, but several vessels, and of a running account against those several boats. It is respectfully submitted that as to the facts in the case of *Pratt agt. Reed*, (19 *How.*, *U. S.*), no one doubted the justice

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of that decision, and that it is only the general language and general rule too strongly laid down in that case, that the decision has been modified, and that this case is in all forms with *Pratt* agt. *Reed*, (19 *How.*, *U. S.*)

II. In the case of *Pratt* agt. *Reed*, (19 *How.*, *U. S.*), and all the cases above referred to, the doctrine is established, that for supplies furnished to a vessel in a foreign port, the necessity, render the circumstances stated in the cases, a presumption of credit of the vessel existed, nothing more. We submit, that where the libellant who furnishes the goods is personally examined, no such presumption can be inferred when he does not state or claim that he trusted the credit of the vessel, or that he dealt on her credit.

It is a good and reasonable presumption, that when the libellant's mouth is shut to presume a credit, but when he is examined no presumption should be made.

III. But whatever presumption is to be drawn from the facts required to make such lien, no such presumption exists here, but the contrary is shown :

1st. The goods are not charged to the vessel and although the libellant is sworn this is not explained.

2d. The libellant's book-keeper is sworn and he states that where the vessel is to be charged her name is placed in the account.

3d. The fact is, that the account is a general and running account and made out in the libellant's books against the company itself.

DENNIS McMAHON, for the libellant and appellee.

I. The libellant having proven a sale and delivery of coal on board of a steamship, used by it in its navigation in a foreign port, ordered by the owners' agent, the presumption of law would be that the goods were purchased on the credit of the steamship itself, and the claimants must displace that presumption (See Judge TANEY's remarks in *Thomas*

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agt. *Osborne*, 19 *How. U. S.*, citing the *Gen. Smith*, 4 *Wheat.*, 443; *Freeman* agt. *Buchingham*, 18 *How., U. S.* 182; *The Santiago de Cuba*, 9 *Wheat.*, 417).

II. Where the owners of a steamboat need coal for their steamboats, and have no coal on hand for their boats, but actually buy same at the lowest cash price in a foreign port, the presumption of law would be that they had no credit to buy it on their own responsibility otherwise than for cash. If the material man waives the preliminary, cash on delivery, the presumption of law is that he does not do it on the exclusive credit of the buyer, but rather on the credit of the ship to which it was delivered in a foreign port (*The Sea Lark*, *Sprague's decisions*, 573). There is nothing in the recent case of *Pratt* agt. *Reed*, to disturb the old doctrine—"tacit lien arises when the circumstances necessary to create it exist."

III. Baltimore being the port of supply is the port of necessity, and in case the company's credit becomes a material element in the lien, its credit in that port must be the standard.

IV. The claimants rely on the entry in the libellant's ledger and the journal entries, as conclusive evidence that the credit for the supplies in question were given to the Commercial Steamboat Company. The original entries in the day-book were not called for by the claimants, but from the journal entries, it is apparent that the day-book entries which are thus journalized were debited to each steamer by name.

Entries in books are always explainable. The truth of the transaction can be shown, independent of the entry. In face of the orders of the goods for the Patapsco by name, and in face of the deliveries on that steamer itself, and of the rendition of bills aggregating the different deliveries to the several steamers by name, and of the evidence proving a delivery on the faith of the implied hypothecation of the Patapsco, the mere entries in the journal and ledger, which

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are not the originals, ought not to weigh much on the subject of a personal credit. Even the taking of the company's note would not create a presumption that the credit was personal, and would not displace a *bona fide* lien if the note were surrendered at the trial (*The Guy*, 9 Wallace, 758; *The Kalorama*, 10 Wallace, 204).

Nor ought such charges in the books possess as much weight on the subject of a personal credit, as the fact that the material man had commenced a common law action for the claim. Yet, in the *Kalorama* (10 Wall., 204) such suit *in personam* in a state court was held not to be conclusive against a lien *in rem*.

V. To displace the lien, the onus is thrown on the claimant to establish that the sale and delivery of the coal in question was on the exclusive credit of the Commercial Steamboat Company (*The Lulu*, 10 Wall., 192).'

This the facts rebut.

Mr. Justice DAVIS delivered the opinion of the court.

Boyce, a coal dealer in Baltimore, filed a libel against the steamer Patapsco, in the district court at New York, to recover a demand for six separate supplies of coal, furnished between the 3d of February and the 26th of March, 1866, to the steamer Patapsco. One Borland intervened as claimant. The question was whether the coal had been furnished on the credit of the vessel or on that of her owners only?

The facts as we assume them from the weight of the evidence, itself somewhat inconsistent, were thus: The Commercial Steamboat Company, a corporation of Rhode Island, owned and chartered certain steamers, the Kingfisher, &c., and used them as a line of steamers from New York to Baltimore. The Patapsco was chartered by the company to run on the line, and registered at New York in the individual name of one Bacon, president of the company; though the company controlled her. The company had an agent at Baltimore, and the course of dealing was as follows:

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When the steamers would arrive at Baltimore, their engineers would inform this agent of the amount of coal they needed for their different vessels. Thereupon, the agent would fill up a printed circular directed to Boyce, requesting to furnish "with invoice," to that steamer, by name, (in this case the Patapsco), so many tons of coal; saying nothing about charging anybody. Boyce would then fill up a printed order to his clerk, directing him to furnish the coal to the steamer named. On receipt of this latter order, the coal would be delivered on board the steamer. At the end of a month a bill would be made of all the deliverances to all the boats. The object of making out a general bill at the end of each month, it appears, was to avoid a multiplication of bills and for the sake of convenience.

The entries in the libellant's journal were thus—one example showing all:

BALTIMORE, March, 1866.

COMMERCIAL ST'B'T. CO.:			
80 tons	Geo. C's, st'r	Kingfisher,	\$7..... \$560
25 "	"	" " Patapsco,	7..... 175
60 "	"	" " Kingfisher,	7..... 560
42 "	"	" " Patapsco	7..... 294
			\$1,589

And in his ledger they were thus:

COMMERCIAL ST'B'T CO.:		Dr.			Cr.
1866.			Feb. 5th.	By cash.....	\$3,000 00
Jan'y 30th.	To coal ac.	\$2,896 36	" 9th.	" "	1,000 00
" "	" bituminous ac.	2,963 60	" 15th.	" "	1,849 96
Feb. "	" coal ac.	790 00	Mar. 30th.	" coal ac.	73 50
Feb.	" bituminous ac.	2,416 10	May 5th.	" cash.	136 00
Mar.	" coal ac.	1,550 00	June 30th.	" "	3,008 41
"	" bituminous ac.	1,589 00	" "	" balance.	4,693 79
April	" coal ac.	1,462 50			
"	" bituminous ac.	65 00			
May 16.	" cash.	39 10			
		\$13,761 66			Dr.
			To balance.....		\$4,693 79

The form of entries in the libellant's day-book did not ap-

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pear ; the claimant waiving the production of it, and the bills rendered to the company were not produced.

The coal was sold at the lowest price, and it was necessary for the Patapsco to make her trips, and was used by her in making them. The agent of the steamship Company stated that "the coal bought for the Patapsco was ordered for this steamer expressly, but on account of the Commercial Steamship Company, the same as all coal was ordered and bought for the several steamers constituting the line." "The owners or charterers," he added "were not known in the transaction, but the steamer was supposed to belong to the Commercial Steamboat Company by the parties who furnished the coal."

During the whole time that this coal was furnished, the steamboat company was in an embarrassed state. And on the 3d of February, on which day the first item of the coal for which the steamer was libelled, was furnished, the steamship company executed six promissory notes for \$7,500 each, \$45,000 in all, to the Baltimore and Ohio Railroad Company; following them immediately, and by the 6th, by mortgages on three of their steamers to secure payment. And it owed a balance of \$25,800 to the Neptune Steamboat Company on the 1st of February, 1866, so much remaining due for money laid out, paid, or advanced in the preceding year.

On the 2d of April, 1866, nine days after the last item of coal furnished to the Patapsco, the registered owner, Bacon, executed a bill of sale of her to Borland, already mentioned as the claimant in the case, to secure to him a debt of \$10,500. And on the 10th following, the company failed entirely; the failure being followed by attachments to a very large amount, much of it, like the \$25,800 already mentioned, for money lent, or debts due, prior to the 3d February, 1866; and the result being a general break up of the company in which the creditors got but a small portion of their claim from the whole effects of the corporation.

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It was in virtue of his bill of sale above mentioned that Borland contested the libellant's claim.

The district court dismissed the libel; holding that there was no credit to the vessel. The circuit court, on appeal, held that there was, and reversed the decree. From this reversal Borland appealed to this court.

Whether the coal was furnished on the credit of the vessel, or of the owners is the only point of inquiry in this case. The case itself is not without its embarrassments, for the evidence, in some of its aspects, is not consistent with either theory, but the weight of it, in our opinion, enables us to assert the lien against the ship. It is undisputed that the Patapsco was in a foreign port, and that the coal was ordered for her, specifically by name, and delivered to the officers in charge of her. It is equally free from dispute that the supply of coal was necessary—indeed, indispensable—to enable her to make her voyage at all.

In such a case the inference is, that the credit was given to the vessel, unless it can be inferred that the master had funds, or the owners had credit, and that the material man knew of this, or knew such facts as should have put him on inquiry (*The Lulu*, 10 Wall., 192). There is no reason to suppose that the master had funds, or the owners of the line credit, nor that the libellant was guilty of laches. On the contrary, it is in proof that the company which owned the line of steamships was, at the date of these transactions hopelessly insolvent and were borrowing large sums of money on a mortgage of their steamers, away from home, and in the very city where the libellant resided. It would be strange if the libellant did not know this condition of things, and, in the absence of proof on the subject, it is a reasonable inference that he did. If he had this knowledge it would be a violent presumption to suppose that he relied on the credit of the company at all for the supplies which he furnished. The company running the steamers was a distant corporation, of no established name, and without personal liability in case

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the enterprise recently undertaken should prove a failure, and it is hard to believe that a large and intelligent coal merchant in Baltimore, in dealing with this corporation, intended to renounce his claim against the steamers in case he was not paid. It is very clear that there was no credit to the company at the time of sale, because the coal was sold for cash at the lowest market price. And when the libellant waived his privilege of cash on delivery, and put the coal on board the steamship, the presumption of law would be that he thereby gave credit to the steamship and not to the owners thereof, inasmuch as the supplies were furnished in a foreign port. If the credit was to the vessel there is a lien, and the burden of displacing it is on the claimant. He must show, affirmatively, that the credit was given to the company to the exclusion of credit to the vessel. This he seeks to do by the form of charge in the libellant's journal and ledger. If it be conceded that these entries tend to support this position, they are far from being conclusive evidence on the subject. Entries in books are always explainable, and the truth of the transaction can be shown independent of them. The form of charge in any book of original entries does not appear, as the day-book was not called for by the claimants, nor are the "invoices" which the libellant was directed to furnish with the coal produced.

But, from the form of entry in the journal itself (where the amount furnished to each vessel is set opposite to its name), we are led to the conclusion that the day-book entries which are thus journalized were debited to each steamer by name.

If this be so, the journal entries are not inconsistent with the idea of the credit being given on the security of the ship. More especially is this apparent when it is proven that the reason why monthly accounts were made to the steamboat company in bulk was for the sake of convenience, and to save a useless accumulation of bills.

There is nothing besides this journal entry to indicate that

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the coal was furnished on the personal credit of the company; and, as the other facts in the case are in favor of a charge direct to the steamship, we do not think the legal inference of credit to the ship is removed.

The lien of material men for supplies in a foreign port is of so high a character that, in the case of *The St. Jago de Cuba*, (9 *Wheat.*), it was protected, along with that of seamen's wages, against a forfeiture which had accrued to the United States; and the recent decisions in this court have had the effect to place this lien on a more substantial footing than some previous cases had seemed to have left it (*Grape-shot*, 9 *Wall.*, 129; 10 *Wall.*, 192, 204.)

On the whole, while we concede, that the case is not free from difficulty, we are not disposed to disturb the decree of the circuit court, in any particular.

Decree affirmed.

COURT OF APPEALS.

IRA BABCOCK, appellant, agt. THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, respondent.

Where the owner of freight; which is to be carried by several railroad companies before it reaches its final destination, enters into a special contract with the railroad company from where it starts, to carry the freight, for a specified price to a certain station, which is the termination of the route of said railroad, and there to be delivered to another railroad as a connecting line, the owner, in consideration of the reduced price on the freight, agreeing to assume the risk of fire and other contingencies, which risk, and the other stipulations, are made applicable, by the general printed form of the contract, to all the other companies, is not a *through contract*, which enables the companies after the first, to avail themselves of the owner's special agreement with the first.

The latter companies take the freight under the liability of common carriers, and if the freight is destroyed by fire while in the possession of one of them it is liable as a common carrier.

It must however appear to be clear by the special contract of the owner with the first railroad, that it was intended to cover only the route of that road. And in construing such a contract, the printed form must give way to the written word where it is inconsistent with the latter.

Argued May 21, 1872.

Decided May 27, 1872.

G. W. COTHRAN, *for appellant.*

THIS is an appeal from a judgment of the general term of the supreme court, sitting in the fourth judicial department, affirming a judgment for the defendant entered on decision of the court, without a jury.

On November 14, 1867, the plaintiff shipped fifty-six barrels of refined petroleum, at Oil City, in the state of Pennsylvania, by the Atlantic & Great Western Railway Company, under an agreement.

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That company carried the petroleum to Corry, also a station on its road, and there delivered it to the Buffalo & Pittsburgh Railroad Company, which company carried it to Brocton, in this state, and delivered it to the defendant. While in the possession of the defendant it was destroyed by fire.

The price of transportation of a car of petroleum from Oil City, by the road of the Atlantic & Great Western Railroad Company, on November 14, 1867, was \$25 the price stipulated in the contract.

The facts were all agreed upon, and are set forth in the case, from folio 59 to folio 67. No other evidence was given, or fact agreed upon, than what appears between those folios.

The case was tried before Justice BARKER, without a jury, at the June (1870) circuit, held in Erie county, and he rendered judgment for the defendant. Judgment was accordingly entered August 17, 1870, and was affirmed at general term, July 26, 1871.

The main question in this case arises upon the face of this special contract.

I. It is contrary to sound public policy to permit a common carrier to restrict its common law liability by contract (*Pennsylvania R.R. Co. agt. Henderson, Pa.*, 315).

I make this point with the full knowledge that there are authorities in this state tending to establish a contrary doctrine; but I do not know but what this court desire to depart from that doctrine and return to sound principles, well established and long adhered to before the great power of railroad companies had been fully developed.

II. Should the court not deem this the appropriate time to make a departure, but should feel constrained to follow bad precedents—established by a misconception of the authorities relied upon, as will readily appear by an examination of these cases—I still insist that to secure exemption from liability by special contract, at least two things must occur:

1. The exemption must be secured by clear and unam-

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bigious or doubtful language. Such exemption being an innovation upon the common law rules and rights of the plaintiff, if there be any doubt about whether the exemption is secured, that doubt will be resolved in favor of the plaintiff (*French* agt. *Buffalo, N. Y. & Erie R.R. Co.*, 4 *Keyes*, 108; *Steam Navigation Co.* agt. *Merchants' Bank*, 6 *How. U. S.*, 344; *Wells* agt. *Steam Navigation Co.*, 8 *N. Y.*, 375).

2. There must be a consideration to maintain a contract securing such exemption.

There was no consideration whatever in this case, as I will show under a subsequent point.

III. The bill of lading is a contract for the transportation of car 1848, and its cargo from Oil City to Corry only.

1. It in express terms makes Corry the place of performance.

The fact that a station short of the ultimate place of delivery was written in a printed blank is conclusive evidence that its operation was limited to the station thus designated.

More especially is this so, when as in this case, had Corry been omitted and the blank space remained, it would have been a contract for transportation from Oil City to Albany.

It being competent for parties to make such contracts as they please, (so long as no rule of law is violated,) it was competent for those parties to make a contract for transportation from Oil City to Corry; and that it precisely what they did make.

The mention of "connecting roads," in the printed form simply proves that this contract was made on the company's usual blank which was susceptible of being so filled up as to extend its provisions to such "connecting roads" or not, as the A. & G. W. R.R. Co. choose to make it.

And the fact that such a blank space was left goes to show that the A. & G. W. R.R. Co. was in the habit of limiting or extending the application of its contracts as it deemed

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meet; and that the termination thereof at Corry in this instance was designed.

• The special contract in this case differs widely from that in the case of *The Manhattan Oil Co. agt. The Camden & Amboy R.R. Co.*, (5 Abb. N. S., 289, S. C., 52 Barb., 72).

In that case the agreement in terms extended to the whole route.

2. Again: The consideration agreed upon and stipulated in it is but \$25, "the regular and customary price of transportation of freight by the A. & G. W. R.R. Co. from Oil City to Corry."

Had the Atlantic & Great Western R.R. Co. intended this as a bill of lading from Oil City to Albany, the price of carriage between those two points would have been fixed instead of the price of carriage from Oil City to Corry.

IV. There was no consideration for any exemption from the common law liability as common carriers of the Atlantic & Great Western Railway Company or any connecting road.

The case shows that "at the time of receiving said oil and packages, the regular and customary price of the transportation of freight upon said railroad of the Atlantic & Great Western Railway Company from Oil City aforesaid, to Corry, was twenty-five dollars per car."

This applies generally to all classes of freight.

There being no consideration for the exemption from common law liability sought to be secured by this contract, the agreement in so far as the exemption goes is inoperative.

To relieve a common carrier from its legal responsibilities, there must be a consideration for the exemption. There must be mutuality to uphold the agreement (*Bissell agt. N. Y. Central R.R. Co.*, 25 N. Y., 442).

The Atlantic & Great Western Railway Company having failed to secure a restriction of its common law liability, it follows that the contract can furnish no immunity to the defendant for its omission to deliver the oil at Buffalo, even if the defendant could avail itself of its provisions.

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V. The opinion of the general term certainly throws no light upon this case. The sole authority cited is as foreign to this case as it is possible to find a case. There is neither a fact nor a principle in common between the two cases.

The whole of this case resolves itself down into this proposition: The Atlantic & Great Western Railway Company made a contract to carry this oil from Oil City to Corry. It performed that contract. The defendant received the oil from The Buffalo, Corry & Pittsburgh Railroad Company, and while in its possession, as a common carrier, the oil was destroyed.

Can the defendant claim exemption from liability under a contract to which it was in no way a party? I say it cannot; and that this judgment should be reverse, and judgment ordered for the plaintiff for the value of the oil agreed upon.

A. P. LANNING, *for respondent.*

This is an appeal from a judgment of the general term, in the fourth department, affirming a judgment entered on the decision of the court below, on a trial without a jury.

The action was brought to recover the value of fifty-six barrels of refined petroleum oil, casually destroyed by fire at Brocton, N. Y., and while in the possession of the defendant as a common carrier.

The oil in question was delivered to the Atlantic & Great Western Railway Company, at Oil city, in the state of Pennsylvania, November 14, 1869, to be transported thence to Albany, in the state of New York, *via* Corry, Brocton and Buffalo, over its own and connecting railroads. The Atlantic & Great Western Railway extending from Oil City to Corry, the Buffalo, Corry & Pittsburgh Railroad extending from Corry to Brocton, a station upon the line of the Buffalo & Erie Railroad, the said Buffalo and Erie Railroad extending from Erie to Buffalo and passing through Brocton aforesaid,

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and the New York Central Railroad extending from Buffalo to Albany, constituted the line of connecting railroads over which the said oil was to go to Albany.

A special contract for the transportation of this oil was made with the Atlantic & Great Western Railway Company at Oil City, at the time of shipment, by which special contract the Atlantic & Great Western Railway Company and the other connecting railroad companies agreed to transport the oil to Albany, with the express condition that the owner or shipper assumed all risks of damage from fire while the oil was in transit, or at the depots or stations of any of the companies over whose line of road it might be transported.

The railroad companies were released from liability for damage by fire in consideration of a reduction in the rates for transporting such oil.

Under such agreement the Atlantic & Great Western Railway Company carried said oil from Oil City to Corry, and there delivered the same to the Buffalo, Corry & Pittsburgh Railroad Company, which latter company carried said oil from Corry to Brocton, and there delivered the same to the Buffalo & Erie Railroad Company, to be by it carried under and in pursuance of said agreement upon its said railroad from Brocton to Buffalo, and there to be delivered to the New York Central Railroad Company.

After said oil was so delivered to the Buffalo & Erie Railroad Company, and while in its possession at Brocton, the same was casually burned up. The value of the oil was \$1,200.

The defendant became a corporation by the consolidation of the Buffalo and Erie Railroad Company with other railroad companies prior to the commencement of this action.

The court decided that by reason of said special agreement, the defendant was not liable to pay for the oil thus casually destroyed by fire, and directed a judgment against the plaintiff.

To this decision the plaintiff's counsel excepted.

Thereupon a judgment was duly entered against the

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plaintiff, from which he appealed to the general term of the supreme court, and by which court said judgment was affirmed.

From that judgment this appeal is brought.

The question presented is as to the liability of the defendant for the loss by fire under the special agreement set forth in the case and the facts found by the court.

I. A common carrier may, by special agreement with the owner or shipper, limit its liability for damages to property delivered to such carrier for transportation (*Steinweg agt. Erie R.R.*, 43 N. Y., 123; *French agt. The Buffalo, New York, and Erie R.R. Co.*, 4 Keyes, 108; *Dorr agt. The New Jersey Steam Navigation Co.*, 1 Kernan, 485).

And it may by special agreement secure such exemption from liability for injuries arising from the negligence of its servants (*Bissell agt. The New York Central R.R. Co.*, 25 N. Y., 442)

In the case at bar the loss was casual.

There was no negligence.

II. By the terms of this special contract the plaintiff assumed the risk of fire, and released all the connecting roads from liability to pay any damage by reason of the casual burning of said oil.

It is found as a fact by the court, that the oil was delivered to the Buffalo and Erie Railroad Company at Brocton, to be carried under and in pursuance of said agreement over its said railroad to Buffalo.

The presumption is that the proof warranted such finding, and the case does not purport to contain all the evidence given upon the trial.

Nor will this court look beyond the facts found (*Bergen agt. Wemple*, 30 N. Y., 319).

III. The written contract recites a good and valid consideration for the exemption, and the connecting roads are entitled to stand upon the recitals therein without inquiry, and are protected by them as against this plaintiff.

Nor does the finding of the court that \$25 per car was the

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customary price for the transportation of oil from Oil City to Corry necessarily conflict with the recitals in the written contract.

The defendant is, therefore, entitled to the benefit of the stipulations contained in such special contract (*Manhattan Oil Co. agt. Cam. & Am. R.R. Co.*, 52 Barb., 72; *Maghee agt. The Cam. & Am. R.R. Trans. Co.*, 45 N. Y., 514).

IV. The judgment should be affirmed with costs.

ALLEN, J.—To exempt the defendant the successor in liability to the Buffalo & Erie Railroad Company from the common law responsibility of common carriers extending to all losses, except those resulting from the act of God, or the public enemies, it must appear that the oil of the plaintiff was at the time of its destruction in the possession of the Buffalo & Erie Railroad Company for transportation under a special contract restricting the liability of the carrier, made by, and with the plaintiff or some one authorized to act in his behalf.

The contract with the Atlantic & Great Western Railway Company was special in its terms, and by it the liabilities of the carrier were greatly restricted, and a loss by fire was excepted from the risks of the carrier, and if that was a through contract, that is, a contract for the carriage of the property to and a delivery of it at Albany its ultimate destination, each carrier in the course of its transit including the Buffalo & Erie Railroad Company was entitled to the benefit of the exemptions from liability secured by it. It would be regarded as made for the benefit of all who should undertake the carriage of the goods upon the terms and conditions prescribed by it. If it was not a through contract then the Buffalo & Erie Railroad Company received the goods as common carriers, and are liable as such for all losses not within the recognized exceptions, that is, except those which were inevitable or occasioned by public enemies.

If the first carrier, the Atlantic & Great Western Railway

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Company, only undertook for the carriage of the oil to Corry for an agreed compensation, and the delivery at that place to another carrier, there was no authority resulting from the relation, or the contract between that company and the plaintiff, in the company to enter into a special contract in behalf of the plaintiff with the next carrier at Corry, to limit and restrict the liability of such carrier in any respect. There was no agency created, the whole duty of the Atlantic & Great Western Railway Company was that of a carrier, and terminated with the delivery of the goods to the next carrier, and the common law liability of the carrier receiving the goods attached at once, and by necessary implication, upon their receipt.

The goods were received by the Atlantic & Great Western Railway Company at Oil City in Pennsylvania, addressed to J. W. O. & Co., Albany, New York, and had they been received without a special contract, a contract would not have been implied on the part of the railway company to carry the goods, or provide for their carriage beyond the terminus of its road.

Its whole duty would have been performed by transporting them to the extent of its own route and delivering them to the next connecting carrier, that is, the railway company would have been liable as a carrier over its own road, and as forwarder from the terminus of its line. This is the recognized rule in this and other states, although it is otherwise in England (*Root agt. The Great Western R.R. Co.*, 45 N. Y., 514, and cases cited by RAPALLO, J.; *Redfield on Carriers*, § 181, and cases cited in note 9). But the goods were received by the Atlantic & Great Western Railway Company under a special contract and upon the interpretation of that contract, and the effect to be given to it, the decision of this case hinges.

In the agreement, the goods were described as "56 bbls R. Oil, car 1848," and in the margin "marked J. W. O. & Co., J. W. Osborne & Co., Albany, N. Y."

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The mark or direction of the property was given to identify and distinguish it from other property of the same character, and was not inserted as a part of the agreement, and from it a contract to carry to Albany would not be implied. The agreement was by "this (the Atlantic & Great Western Railway) Company and connecting roads," to deliver the property at Corry station—which was the terminus of the road of that company upon payment of freight and charges thereon. The freight was specified at twenty-five dollars per car.

This was the freight to Corry, and no rate was agreed upon or specified for transportation beyond that place.

By the agreement the plaintiff "in consideration of the reduced rate given and specified above, for the transportation of petroleum," assumed certain risks, including that by which the property was destroyed, "while in transit, or at the depots or stations of any of the companies whose lines of road it may be transported upon or over."

The plaintiff also, in consideration of having the petroleum transported at such reduced rate, released the Atlantic & Great Western Railway Company, "and all other companies over whose lines of road it may pass, from all claim for loss or damages by fire, &c."

The agreement was made by filling up a printed form, adapted to a contract for the transportation of goods beyond the route of the contracting carrier, and over the lines of other and connecting roads to distant places. The parties merely inserted in writing the date and place of shipment, the name of the owner, the description of the property, the freight, and the place of delivery (Corry station). The commencement and termination of the responsibility of the carrier (the Atlantic & Great Western Railroad Company) were expressed clearly and distinctly in the written parts of the contract.

The goods were not lost or destroyed between the place of the receipt and Corry, nor until after they had left Corry.

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in charge of other carriers, and had come into the possession of the Buffalo & Erie Railroad Company, in the course of their transit to Albany.

The contract was for the carriage of the oil to Corry, and only so much of the printed matter of the blank form used as is consistent with and appropriate to that contract, is of any effect. The intent of the contracting parties is to be gathered from the entire instrument; the written part controlling when that and the printed are in conflict, and the latter to be rejected when incompatible with or inappropriate to the intent of the parties as clearly indicated by the written portion.

The printed form is very general and contains provisions adapted to contracts differing essentially from this, some of which are not adapted to a contract for the carriage of goods wholly within the limits of the contracting carrier's line of road, and such parts as are inapplicable must be rejected as surplusage, and the written portion of the agreement prevail (*Leeds agt. Mechanics' Ins. Co.*, 4 *Seld.*, 351; *Harper agt. Albany Mutual Ins. Co.*, 17 *N. Y.*, 194).

The limitation of the carrier's liability by the contract is necessarily confined to the service contracted for, and the carriers who were parties to it.

Carriers who are not named in a contract for the carriage of goods, and who are not formal parties to it, may under some circumstances have the benefit of it.

Such is the case when a contract is made by one of several carriers upon connecting lines or routes for the carriage of property over the several routes for an agreed price, by authority express or implied of all the carriers.

So too, in the absence of any authority in advance, or any usage from which an authority might be inferred, a contract by one carrier, for the transportation of goods over his own and connecting lines, adopted and acted upon by the other carriers, would enure to the benefit of all, thus ratifying it, and performing service under it. But in such, and the like

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cases, the contract has respect to, and provides for the services of the carriers upon the connecting routes (*Magee* agt. *The Camden & Amboy R.R. & Trans. Co.*, 45 N. Y., 514, and *Lamb* agt. *The Same*, 46 N. Y., 272), are in point and illustrate the rule.

There was no agreement here for the carriage of the oil beyond Corry. No rate of freight agreed upon to any other point, and the carrier was entitled to receive the freight earned, twenty-five dollars per car on delivery of the oil at that place.

There was no consideration for an agreement by the plaintiff to relieve the carriers, who should hereafter receive the property for transportation, from the common law liabilities, and no such agreement was made. It is claimed that the finding by the judge by whom the case was tried, that the Buffalo & Erie Railroad Company received the property "under and in pursuance of said agreement upon its said railroad from Brocton to Buffalo," is conclusive as a finding of fact, and entitles the defendant absolutely to the benefit of the stipulations of the contract.

The answer is that the transportation from Brocton to Buffalo is not within the limits of the contract, and it was simply impossible that goods could be carried between these places in pursuance of a contract expressly providing for an entirely different transportation, between two other places on a different route. While twenty-five dollars per car freight, might have been a reasonable, or a reduced rate, for transportation from Oil City to Corry, it may have been an entirely inadequate, or an exorbitant rate for transporting the same property from Corry to Brocton, or from Brocton to Buffalo, or Buffalo to Albany. It is certainly improbable that the same freight was to be the compensation to each of the railroad companies by whom the oil should be carried in its transit to Albany. The contract was not intended as a through contract. The plaintiff had no claim under it either against the Atlantic & Great Western Railway Company, or any of the connect-

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ing roads for the carriage of the goods beyond Corry, and it necessarily follows that its stipulations did not extend to effect the carriage beyond that place.

The Camden & Amboy Railroad and Transportation Company were held liable as common carriers under a contract somewhat like this, made with the Pennsylvania Railroad Company under which the goods were transported by the latter company to Philadelphia, and there delivered to the former company (*C. & A. R.R. and T. Co. agt. Forsyth*, 61 Penn. 81; *Bristol and Exeter R.R. Co. agt. Cummings*, 5 H. and Ct., 969), merely held carrying out the doctrine of *Muschamp agt. The Lancaster & Preston Junction R.R. Co.*, (8 M. & W., 421), which has not been followed in this state, that the contract of carriage in that case was a through contract made by the Great Western Railway Company for the carriage of the goods to their ultimate destination and that the contracting carrier was solely liable for the loss of the goods in transit, although they were lost while in course of transportation by the defendants who received them from the first carrier at terminus of its road for transportation to the place to which they were directed. This case would not be followed with us, but each carrier would be held responsible for a loss or damage to the goods while in his custody, and the only question would be as to the extent of his liability, and whether he was entitled to the benefit of any stipulation in the contract made with the first carrier.

The defendant upon the case made, and facts found by the judge at the trial was subject to all the common law liabilities of carriers and the stipulations of the contract with the Atlantic & Great Western Railway Company, did not extend to the transportation of the goods by the defendant. It is not necessary to consider at this time, the liability of the parties, in case it should appear that the oil was being carried at a reduced rate of freight.

The judgment must be reversed, and a new trial granted.

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SUPREME COURT.

HELEN M. WARD, respondent, agt. EDGAR C. BUNDY,
appellant.

A county judge has authority to make an order out of court—at chambers—to stay proceedings on a judgment until the hearing and decision of a motion for a new trial in the county court.

Albany General Term, March, 1872.

Before MULLIN, P. J., POTTER and BALCOM, JJ.

THIS is an appeal from an order of the county judge of Otsego county made at chambers, on the 10th day of January, 1872, staying defendant's proceedings on judgment until the hearing and decision of motion for a new trial in the county court.

The action was tried at the June term, 1871, and a verdict for the plaintiff for less than \$50. Both parties moved for time to make a case, &c., and an order was entered on the defendant's motion, but none on the plaintiff's motion.

Plaintiff made a case, and amendments were proposed and settled, as the order entered did not stay proceedings. Defendant's attorney served copy, costs and motion of adjustment for December 29, and on that day judgment was entered. Plaintiff's attorney then served motion papers for the 10th of January, at the office of the county judge to stay defendant's proceedings. Defendant appeared with an affidavit and transcript of the judgment, and objected for want of authority in the judge to hear the motion at chambers.

The judge made the order, which was entered by the clerk, from which this appeal is taken.

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L. S. BUNDY, *for appellant.*N. C. MOAK, *for respondent.*

By the court, MILLER, P. J.—I think the county judge was authorized to grant the order in question. By section 31 of the Code the county court is always open for the transaction of business for which no notice is required to be given to the opposing party. This relates, I think, to the transaction of the ordinary business of the county court, and not to orders which may be otherwise made by the county judge in his official capacity while not sitting as a county court.

Section 401 of the Code provides for motions to be made to "a judge, or justice out of court," which would seem to include a judge of the county, and other courts as well as justices of the supreme court, and subdivision 6 of this section provides that "no order to stay proceedings for longer than twenty days shall be granted by a judge out of court, except to stay proceedings under an order, or judgment appealed from, or upon previous notice to the adverse party."

By section 8 of the Code, the provision last cited is made applicable to actions in the county court. It would, therefore seem, that the order of the county judge was proper under section 401. It may be added that the last subdivision of section 366 applies the rules of practice of the supreme court to actions tried in the county court. Section 402 also provides for motions to be made out of court to a judge on the usual notice of eight days which, as already seen under section 8, is applicable to county courts.

The provision in section 362 as amended returns does not militate against section 401 as the latter section relates to proceedings affecting the merits of the case, and not to an order as to the practice.

While section 31 may have full force and effect, in relation to the county court, which had no power at the time it was adopted to try causes, it does not impair the power of a

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judge in any case out of court to grant an order to stay proceedings.

The order in question is not made by the court while sitting as such, but by a judge out of court, the same as any other order which he has the power to make as a judge. It appears to be eminently proper that a judge out of court should be vested with authority to control the practice of his own court so far as relates at least to a stay of proceeding for the purpose of allowing the party to bring in his case for argument. I think that the exceptions should be first heard in the county court before an appeal is taken (30 *How.*, 4), but even if an appeal may bring up the whole case, there can be no objection to such a course. As the county judge was right in granting the order, it should stand. Order affirmed with \$10 costs of appeal.

Flynn agt. Hatton.

N. Y. COMMON PLEAS.

ELIZABETH FLYNN, by her guardian, respondent, agt. MARY F. HATTON, appellant.

The mere agreement of a landlord to repair, has reference only to the condition of the building or premises demised for the purpose of their profitable use, and the pecuniary benefit to be derived from their enjoyment or loss from being deprived of their use in such state of repair as the agreement intended.

Such a simple agreement or covenant, in no way contemplates any destruction of life or casualties to the person or property of any one, which might accidentally result from an omission to fulfil the agreement in every respect.

For the proposition that a landlord under contract (generally) to keep the premises in repair is for a breach thereof, also further liable to his tenant, *as in tort*, for wilful refusal or neglect to perform his obligation, no warrant is to be found in principle or authority.

His subsequent *parol* promise, after being notified of defects, to make necessary repairs, unless founded on a new consideration, superadds nothing to his original obligation, and furnishes no ground for awarding additional damages, except so far as the tenant is by such promise delayed and limited in making them (primarily) at his own expense.

A claim cannot exist on the part and behalf of sufferers from defects to a piazza appurtenant to a tenement house, occurring from natural causes—from natural wear and tear, in an action *for a tort or negligence* against the landlord, whose only obligation exists in contract with the tenant in possession, and one can only be founded on some other negligence, trespass or wilful breach of a direct public or private duty to the party injured.

In this case, *held*, that the negligence of the parents, in suffering the plaintiff, a child about three years of age, to wander upon this dilapidated piazza or balcony, and exposing it to danger and the injuries it received was so gross and unambiguous as to constitute contributive negligence and should prevent a recovery by the plaintiff for damages for such injuries.

General Term, July, 1872.

Before DALY, Ch. J., ROBINSON and LARREMORE, JJ.

APPEAL from a judgment rendered by the special term for the plaintiff.

ALBERT MATTHEWS, *for appellant, defendant.*

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First. The negligence of her parents in allowing the infant plaintiff to expose herself to danger must be imputed to the infant, and forms such an element of contributive negligence as to bar her recovery (*Hartfield agt. Roper*, 21 *Wend.*, 615; *Brown agt. Maxwell*, 6 *Hill*, 592; *Krieg agt. Wells*, 1 *E. D. Smith*, 74; *Munger agt. Tonawanda R.R. Co.*, 4 *N. Y.*, 359; *Mangam agt. Brooklyn City R.R.*, 36 *Barb.*, 230; *Burke agt. Broadway & 7th Ave. R.R.*, 49 *Barb.*, 529; *Wilds agt. Hudson R. R.R. Co.*, 24 *N. Y.*, 430; *Same agt. Same*, 29 *N. Y.*, 315).

1. The same rule was applied to the keeper of a lunatic, in *Willets agt. Buffalo & Rochester R.R. Co.*, (14 *Barb.*, 585).

2. There was not the slightest evidence of proper care on the part of the parents to support a finding in favor of plaintiff in that respect; on the contrary, there was the fullest evidence of want of any precaution to prevent access of the plaintiff to the piazza, in the face of open and notorious danger (*Spencer agt. Utica & S. R.R. Co.*, 5 *Barb.*, 337).

3. The fact of the child being alone in the dangerous place, is presumptive evidence of negligence in the parents.

The burden of proving the exercise of every reasonable precaution to prevent the accident, was thrown upon them, but was not met (*Mangam agt. Brooklyn City R.R. Co.*, 36 *Barb.*, 230).

4. The child had no right to use or be upon the balcony. It was no part of the premises for her use, and until it was put in repair the plaintiff had no right to endanger herself by the use of it. Using it, the plaintiff alone was to blame (*Bush agt. Brainard*, 1 *Cow.*, 78; *Terry agt. The N. Y. Central R.R. Co.*, 22 *Barb.*, 574).

Second. In addition to the culpable negligence of the parents of the plaintiff, there was the grossest negligence on her own part. The burden of proof was on the plaintiff to show due care and diligence on her own part (*Britton agt.*

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Hudson R. R.R. Co., 18 N. Y., 248; *Dey agt. N. Y. C. R.R. Co.*, 34 N. Y., 9).

1. An infant is held to the same degree of care as an adult, and "is required to exercise the prudence of a person of ordinary intelligence, before an action for damages arises for an injury to her person, resulting partly from the carelessness of others."

"It is no excuse that she had less discretion than a grown person" (*Burke agt. Broadway & Seventh Av. R.R. Co.*, 49 *Barb.*, 529; *Honigsberger agt. Second Av. R.R. Co.*, 38 N. Y., 1 *Keyes*, 570), and numerous other cases.

2. It was fully proved that "anybody could tell that the piazza was dangerous by the looks of it. That it was very shaky; and all the witnesses agreed in representing the unsafe condition of the piazza as a fact well known to the occupants of the room, and consequently to the plaintiff; in fact, she had been warned against it.

Third. There was no proof of negligence on the part of the defendant. The defendant's obligation to repair did not make her responsible for accidents resulting from use of the balcony while it was out of repair.

Fourth. Great stress was laid in the court below on the alleged fact that the balcony in question was one of the appurtenances of the room, and that the plaintiff had a right to use and go upon the same. This theory is not available, for

1. The piazza was not an appurtenance to the room for the plaintiff. She could have no occasion to go upon it for any of the purposes for which it was alleged to have been used, viz., drying clothes, &c.

2. If to a charge that the plaintiff suffered injury by negligently going into a dangerous place, she could make answer that the place was one into which she had a right to go, the defense, contributive negligence, could rarely be sustained.

No man has a right wilfully to place himself in danger, and if injured, lay the blame on third parties.

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Fifth. The learned judge erred in refusing to dismiss the complaint. There should be a new trial, with costs to abide the event.

Sixth. The first question arising in this case is, whether there was any cause of action in favor of plaintiff against defendant. The defendant insists there was not, and that this judgment is without precedent; and asks to have the judgment reversed upon this ground.

1. This case must not be confounded with an action by a tenant to recover damages against his landlord, for injuries sustained by the tenant himself, arising from the neglect of the landlord to perform a valid agreement (or any other legal obligation resting upon him arising out of the circumstances) to keep premises in repair or to guarantee their safety. In such cases there is direct privity between landlord and tenant, and the action itself is either *ex contractu*, or arises directly out of the relationship of landlord and tenant (*Eakin* agt. *Brown*, 1 *E. D. Smith*, 36; *Robbins* agt. *Mount*, 4 *Robts.*, 553; *Johnson* agt. *Dixon*, 1 *Daly*, 178; *Francis* agt. *Cockerel*, *Law Rep.*, 5 *Q. B.*, 184, 501; *Alston* agt. *Grant*, 24 *Eng. Law and Eq.* 122; *Eagle* agt. *Swayse*, 2 *Daly*, 140; *Kimmel* agt. *Burfeind*, 2 *Daly*, 155).

2. The plaintiff endeavors to maintain this action on the ground of what the pleader is pleased to call the "negligence" or non-feasance of the defendant in not repairing or making safe a balcony (alleged to have been dangerous and unsafe) attached to the front of certain rooms, (on the fourth story of a house in East 13th street,) owned by defendant and exclusively occupied by the parents of plaintiff, under a hiring from defendant to plaintiff's father, in using which plaintiff was injured. Assuming the facts to be as alleged by plaintiff, then, in order to maintain the allegation of "negligence," as the basis of an action against the defendant to recover damages sustained by plaintiff in falling from this balcony, there must be shown some obligation, express or implied, either of contract or legal duty of the defendant

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towards the plaintiff, which the defendant has failed to perform. The "negligence" alleged is another word for non-feasance, and is predicable only of some contract voluntarily undertaken by the defendant, or some legal duty cast upon her by operation of law, in some relation between her and plaintiff. If the plaintiff be a stranger to the defendant, and there be no privity by contract between them, (as must be conceded) then is there any private legal duty which the defendant owed to the plaintiff, as a member of the family of the tenant; or any public legal duty owed by defendant to her, as one of the public or otherwise? Clearly the defendant owed no greater obligation of private legal duty to the plaintiff specifically, as one of the family of the defendant's tenant, than to his guests, or friends or visitors. Neither has the plaintiff a claim against the defendant for any neglect on her part to discharge any public legal duty she owed towards the plaintiff as one of the public. The premises in question are purely private property, and the "balcony" could only be reached by any person through the rooms leased to and exclusively occupied by the plaintiff's father, and not by defendant (*Winterbottom* agt. *Wright*, 10 *Mees. & Welsby*, 109; *The Mayor, &c., of Albany* agt. *Cunliff* 2 *N. Y.*, 172, 173; *Nicholson* agt. *Erie R.W. Co.*, 41 *N. Y.*, 530; *Loop* agt. *Litchfield*, 42 *N. Y.*, 351).

3. "Negligence" is well defined as consisting "in the commission of some lawful act in a careless manner, or in the omission to perform some legal duty, to the injury of another. It is essential to a recovery, in the latter case, to establish that the defendant owed at the time some specific, clear, legal duty to the plaintiff, or the party injured" (*Nicholson* agt. *Erie R.W. Co.*, 41 *N. Y.*, 529).

4. As was previously well said by Judge DALY, in the case of *Cook* agt. *N. Y. Floating Dry Dock Co.*, (1 *Hill*, 438), and approved by Judge INGRAHAM, (p. 444;) "The only safe and practical rule is to confine the right of action to those who stand in the relation of contracting parties, or to

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cases where the injury is caused by the disregard or neglect of some obligation or duty, which the party causing it owes to the party injured" (*Nicholson agt. Erie R.W. Co.*, 41 N. Y., 529).

5. If, as erroneously alleged in the complaint, the defendant had "had the care and control of the premises" where the accident happened, or had been the "occupant" of the same, there might have been some pretext for claiming a recovery against her. But the defendant was the mere owner; and the custodian of the plaintiff was himself the "occupant."

6. The mere circumstance that the plaintiff was "lawfully" upon these premises at the time of the accident, is immaterial. It does not tend to raise any obligation of defendant toward her, or to sustain this cause of action. This has always been maintained in all the cases (*Southcote agt. Stanley*, 1 Hurls. & Nor. Exch., 249; *Bolch agt. Smith*, 7 Hurls. & Nor. Exch., 744; *Robbins agt. Jones*, 15 Com. Bench., N. S. 240; *Colles agt. Selden*, 3 Law C. P. R. 495; *Sullivan agt. Waters*, 14 Jurist C. L. R. 460).

7. The doctrine of "*respondeat superior*" does not apply to the facts of this case. There was no relationship of master and servant, or principal and agent, between defendant and any other person connected with the transaction; nor was there any misfeasance or other act done by the defendant or her authority; nor was she, as has been already said, in possession of the premises (*Bush agt. Steinman*, 1 Bos. & Pull., 404; *The King agt. Pedlie*, 1 Ad. & Ellis, 822; *Rich agt. Basterfield*, 4 Manning, Gr. & Scotts, 800; *Hobbit agt. London & N.W. R.W. Co.*, 4 W., H. & G., Exch., 254; *Reedie agt. London & N.W. R.W. Co.*, 4 W., H. & G., Exch., 244; *Blake agt. Ferris*, 5 N. Y., 63; *Earl agt. Hale*, 2 Metcalf, 352; *Boniface agt. Relyea*, 6 Robts., 397).

8. Mere ownership of private property does not impose upon a party any liability to the public, or strangers, to keep the same in repair or free from danger; provided it does not

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disturb a neighboring owner, or injure the public in the use of the neighboring streets or ways, or other public easements (*Chauntler* agt. *Robinson*, 4 *W., H. & G., Exch.*, 170; *Hounsell* agt. *Smythe*, 7 *Com. Bench N. S.*, 731; *Bolch* agt. *Smith*, 7 *Hurls. & Nor., Exch.*, 736; *Gantrels* agt. *Egerton*, *Law Rep.*, 2 *C. P.*, 370).

Seventh. Assuming there was a valid agreement between the defendant (as "landlord") and the plaintiff's father (as tenant) "to repair" this balcony, does that circumstance furnish a ground of action against defendant in favor of plaintiff to recover any damages sustained by falling from it? The defendant insists it does not.

1. The plaintiff and defendant were not contracting parties in any sense whatever.

2. If the defendant's alleged nonfeasance is said to grow out of her relation of "landlord" alluded to, then it is founded upon the contract between the landlord and tenant, and the obligation of the defendant, was to perform that contract, and the "negligence" or nonfeasance complained of is only a breach of that contract, and the remedy is by action *ex contractu*, and only in favor of a party to that contract, or his lawful representatives. The plaintiff, however, is none of these (*Blakemore* agt. *The B. & E. R. W. Co.*, 8 *Ellis & Blab.* 1953).

3. Any agreement to repair was a mere matter between the "landlord" and "tenant." The contract did not affect third persons. It did not make the landlord liable to them, or relieve the tenant in possession from his liability to them (*COLERIDGE, J.*, *Russell* agt. *Shenton*, 3 *Adol. & Ellis, N. S.*, 456; *Cannavan* agt. *Conklin*, 1 *Daly*, 511).

4. The proposition now contended for by the defendant, was thus laid down by this court in *Cook* agt. *N. Y. Floating Dry Dock Co.*, (1 *Hilt.*, 443 :) "That no action lies against the defendants, founded upon the contract in favor of any other person than those to whom the dock was hired, is conceded. This was established by the cases cited, *Winterbottom*

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agt. *Wright*, (10 *Mees. & Welsby*, 109); *Priestly* agt. *Fowler*, (3 *Mees. & Welsby*, 1); *Quarman* agt. *Burnett*, (6 *Mees. & Welsby*, 499)."

5. So, also, said *Justice MAULE*, in *Tallit* agt. *Shenstone*, (5 *Mees. & Welsby*, 288 :) "It is clear that an action of contract cannot be maintained by a private person who is not a party to the contract; and the same principle extends to an action of tort, arising out of the contract."

6. And where a master sought to recover damages for loss of services of his servant, who was injured by the negligence of a railway company, with whom the servant had a contract as a passenger, it was held that "one not a party to a contract cannot sue for a breach of duty, arising out of the contract" (*Alton* agt. *The Midland R.W. Co.*, 19 *Com. Bench*, *N. S.*, 213).

7. So, also, *BARON PARKE*, in the case of *Langbridge* agt. *Levy*, (2 *Mees. & Welsby*, 530), said; "That wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer, * * * is a principle which would lead to indefinite extent of liability, * * * and we should pause before we made a precedent by our decision, which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person into whose hands they might happen to pass, and who should be injured thereby" (*Winterbottom* agt. *Wright*, 10 *Mees. & Welsby*, 114; See, also, *Colles* agt. *Selden*, *Law Rep.*, 3 *C. P.*, 495).

8. So, again, in *Robinson* agt. *Jones*, (15 *Com. Bench*, *N. S.*, 240), it was held by the full court, (after elaborate argument,) without dissent, that "a landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening in consequence, during the term; for, fraud apart, there is no law against letting a

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tumble-down house, and the tenant's remedy is upon his contracts, if any."

9. Without an express contract, the landlord is not liable, even to the tenant, to make any repairs upon demised premises. Such an obligation grows out of the contract alone, and not out of the relation of landlord and tenant. Neither is there, in the absence of fraud, any warranty that the premises are even tenantable or fit for occupation. The rule of *caveat emptor* applies (*Hart* agt. *Windsor*, 12 *Mees. & Welsby*, 68; *Howard* agt. *Doolittle*, 3 *Duer*, 464 & 473; *Sherwood* agt. *Seaman*, 2 *Bosw.*, 130; *Kostor* agt. *Newhouse*, 4 *E. D. Smith*, 20; *Gott* agt. *Sounds*, 22 *Eng. Law and Eq.*, 178; *McGlashon* agt. *Talmadge*, 37 *N. Y.*, 313).

10. It matters not how stringent may have been the compact between landlord and tenant, that, as between themselves, the landlord should make repairs; the obligation of the tenant to his guests and family, to keep the premises wherein he invited them, safe from danger, was not discharged or impaired or shifted to the shoulders of the landlord. The occupant alone is the sole wrong-doer in privity with such persons, in case of injury from his neglect to procure the repairs to be made, either by the owner or himself. In the language of *Ch. J. KENYON*, (4 *T. R.*, 319 :) "Deplorable, indeed, would be the situation of landlords if they were liable to be harassed with actions for the culpable neglect of their tenants" (*Cheetham* agt. *Hampson*, *Term Rep.*, 318; *Mayor, &c.* agt. *Corlies*, 2 *Sand.*, 303; *Kostor* agt. *Newhouse*, 4 *E. D. Smith*, 20; *Bears* agt. *Ambler*, 9 *Barr Penn.*, 193).

11. Upon the principle now invoked, the courts refused to allow a wife to recover damages for personal injuries resulting from the explosion of a lamp sold her husband, though for the purpose of being used by herself and husband, which the vendor, without fraud, warranted to be fit and proper for use by her, but was, in fact, unfit for use, and dangerous

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and unsafe (*Longmeid and wife agt. Holliday*, 6 W., H. & G. Exch., 761).

Eight. But even if there were a valid agreement to repair this balcony, and this action had been by the "tenant" himself against the "landlord;" and even if it had been an action for breach of contract, it could not avail to recover damages for injuries happening (as in this case) from the use or abuse of the balcony, after it was known to the tenant to be out of repair, unsafe and dangerous.

1. The tenant was not obliged to use it in order to have the fair use and enjoyment of the premises.

2. The tenant knew it was dangerous and unsafe.

3. We have seen that even a "written warranty" of safety would not protect against patent defects; much less would a mere agreement to repair those defects.

4. The tenant had no right to omit making such repairs as were necessary to make the premises safe and secure for the use of himself and all other persons he permitted to use the same, because he had an agreement with the landlord that the latter should make them. In fact, this would have been an additional reason why he should himself make them, and not be excused for his neglect in not making them. In this very agreement he would have had an indemnity against any necessary outlay in making them, and so was inexcusable.

Ninth. If there was a valid agreement to repair, and if the defendant was negligent to such an extent as to have rendered her liable for such an injury as occurred to the plaintiff, because the defendant neglected to perform her agreement, with her tenant, to repair this balcony, knowing it to be out of repair, in a case wherein the plaintiff herself had been free from negligence and had exercised all due and proper care and precaution to prevent the accident; nevertheless, the plaintiff, by contributive negligence of her parent, (she being *non sui juris*), (1st,) in not making the repairs herself, (when he knew the balcony to be out of repair and dangerous and unsafe,) and looking to the landlord for reimbursement; (2d,)

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in making an unusual use of this balcony when known to be dangerous, did herself, thereby, in a legal point of view, contribute to and actually cause the injury of which she complains (*Mangam* agt. *Brooklyn R.R. Co.*, 36 *Barb.*, 230; *Same case on appeal*, 38 *N. Y.*, 459).

1. If the plaintiff claim to derive any benefit from any agreement to repair, she must take it *cum onere*. The party beneficially interested in such an agreement would have had no right himself to rush into danger he might avoid, and look for damages to the other party to the contract. Neither can his infant daughter (*Butterfield* agt. *Forrester*, 11 *East*, 60; *Miller* agt. *Mariners' Ch.*, 3 *Greenlf.*, 55; *Shannon* agt. *Comstock*, 21 *Wend.*, 461; *Hecksher* agt. *McCrea*, 24 *Wend.*, 309).

2. If the defective balcony could even be deemed to be in the nature of a "nuisance," because liable to be the means or occasion of mischief to persons using it, still the plaintiff's father, being the occupant of the premises, "is liable for the damage caused by its continuance," and so, by neglecting to abate it, contributed, (as the guardian of the plaintiff) to the injury sustained by his ward. This negligence in the eye of the law was contributive negligence of plaintiff (*Brown* agt. *Cay, & Sus.*, *R.R. Co.*, 12 *N. Y.*, 492).

3. In the case of *Adams* agt. *Lancashire R.W. Co.*, (*Law Rep.*, 4 *C. P.* 739, *A. D.* 1869,) where, through the negligence of the defendants, the door of one of their carriages (wherein plaintiff was a passenger) several times flew open, and was shut by plaintiff, and in attempting to shut it a fourth time he fell out and was injured, it was held that, as the inconveniences he would have suffered, if he had not shut the door, was slight, and the peril incurred in his attempt to shut it considerable, the injury he suffered was not the necessary or natural result of defendant's negligence, and they were not liable for such injury.

4. In the case of *Siner* agt. *Great Western R.R. Co.*, (4 *Exch.*, 117), where plaintiff was a passenger in defend-

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ants' railway carriage, which stopped at a station where there was no platform, and plaintiff in alighting from the carriage upon the ground, in the dark, sprained her knee; it was held that the injury was the result of her own act, and the defendant was not liable (*Cochle* agt. *London & S.E. R. W. Co.*, *Law Rep.*, 5 C. P., 457 and notes 459, 460, 464).

5. So in the case of *Waite* agt. *North Eastern R. W. Co.*, (*Ellis, Blk. & Ellis, Q. B.*, *Rep.*, 719, A. D. 1858,) where the plaintiff, an infant in charge of his grand-mother, had been injured by the joint negligence of the defendants' agents and the child's grandmother, it was held the child could not maintain an action against the company.

6. So in *Walker* agt. *Swayze*, 3 Abb., 136), the general term of the court of common pleas laid down the law on this subject as follows: "It has been held in this court, that the measure of damages in an action against a landlord for not repairing, is the amount it would cost to make such repairs; and for the reason that the tenant cannot, by exposing himself, his family or his goods, to the injuries or damage which result from the landlord's negligence, present a meritorious claim, when he could remedy the evil by repairs, for which he would be fully indemnified out of the rental," also *Holly* agt. *Boston Gas Light Co.*, 8 Gray, Mass., 123 & 132; *Wright* agt. *Malden & Nelson R.R. Co.*, (4 Allen, 283).

Tenth. But in this case there was, in fact, no valid agreement between the landlord and tenant that the former should make any repairs to this balcony. The father of the plaintiff was the tenant, and had occupied the house for six years. The promise to repair the balcony was contained in a conversation between the mother of the plaintiff and the defendant. It was not contained in the agreement of hiring, and formed no part of it. It was based upon no consideration whatever, and was not binding upon the landlord (*Walker* agt. *Gilberts* 2 Rob., 214; *Doupe* agt. *Germin*, 37 How., 5).

Eleventh. Upon every view of this case the judgment

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should be reversed. The upholding of the action would tend to establish a rule (now happily without a precedent) opening the door to almost an infinitude of demands in favor of unknown persons, against owners of real estate. Such a precedent would greatly impair the value of such property, and render ownership of the soil a condition full of uncertainty and indefinite liability.

F. H. BRYAN, *for plaintiff, respondent.*

The evidence shows that the premises where this accident occurred, was of that peculiar description of property, known in this city by the name of a tenement house. This court has decided at general term, that such property forms an exceptive case, and that after the attention of the landlord has been called to the existing defects in the structure, in case of non-repair, he is liable for the consequences of an accident, resulting from such neglect.

The attention of the landlord, defendant, was called to the defect of the railing; and by the neglect to repair, the accident occurred.

The balcony in use in which the railing was defective, formed a necessary part of the premises let by defendant to plaintiff; the evidence shows that its use was principally dedicated to the tenant.

The defendant had promised to have the repairs done.

I. In *Johnson agt. Dixon*, (1 *Daly*, 178). This court has held that a tenant from month to month is not bound to make substantial repairs.

In that case the plaintiff's horse having received an injury from the defective construction:

The court directed that the landlord was liable for the consequences arising from his neglect to repair. (43 *Barb.*, 282).

II. On the question of negligence, this, as a question of fact, has been decided by the court below.

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This court will not disturb that decision. It is as conclusive as the verdict of a jury (1 *E. D. Smith*, 213; 3 *E. D. Smith*, 264; 2 *E. D. Smith*, 462; 4 *E. D. Smith*, 218; 25 *Barb.*, 122).

A higher degree of care may well be exacted from persons who own tenement house property than from others. The nature of the property and the uses to which it is applied, would appear to render such greater care necessary.

There appears also to be a disposition in the court to impose in certain cases the exercise of greater care and caution (12 *N. Y.*, 209).

There was no contributing negligence on the part of the plaintiff. The degree of care required of an infant, however intelligent, must be modified by the tenderness of the age.

The plaintiff had no right to anticipate that any accident would occur; she was enjoying a right incidental to the use of the premises, and had every reason to suppose that such right would be enjoyed without injurious accident. A child is only chargeable with care and caution, according to its age and capacity (*Shouler on Domestic Relations*).

III. The defendant did owe a duty to the plaintiff, when a portion of this tenement house was let to the mother of the plaintiff, it was so let for a residence of her and her family. The use of the minor children, was a necessary and presumptive consequence of such letting. The landlord was bound to see, at her own peril, that the railing guarding this balcony was not defective in its construction, which it appears to have been, as found by the court below, and having failed to do this, the defendant was properly held liable.

By the court, ROBINSON, J.—I am of the opinion that the defendant was not responsible for the injury sustained by the plaintiff.

No question is presented as to the extent of damages which the tenant, the father of the plaintiff, has himself sustained by reason of any breach of the landlord's agree-

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ment to repair; nor upon any claim as between parties standing in privity of contract, or estate, and respectively liable to each other; nor upon any claim that the premises, when originally rented to John Flynn, the father, were in a dangerous condition, or in any respect constituted a nuisance, public or private, which continued until the accident and occasioned the injury complained of.

The plaintiff is an infant of two or three years of age; and John Flynn, her father, for some five or six years previous to the occurrence in question, had been a tenant, from month to month, of apartments, consisting of two rooms in the fourth story of a tenement house in the city of New York, the title to which had been recently acquired by the defendant. Outside and across the front of these rooms there ran a piazza, appurtenant to the demised premises, access to which was obtained through a door opening directly from the family sitting room, that was used by the tenant as a place for washing and drying clothes, and storing eatables.

It was protected by a railing, consisting of slats or rails running up and down "about three or four feet" from the floor of the piazza to the top rail. This railing had been for two years getting quite rotten and out of repair, "one end was quite separated and was secured by putting a barrel there."

"It was pretty much all gone." Both the father and mother of the plaintiff were aware of its dangerous condition. The mother says, "she had been speaking about it, and defendant said she would have the repairs done."

On the occasion of the accident, the mother was on the piazza, hanging out clothes, when the plaintiff, whom she had left in the sitting room, without being noticed by her, came out into the piazza, leaned up against the upright railings, one of which gave way, and she fell through the opening, and was precipitated down four stories into an adjoining yard, and sustained the injuries complained of.

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Under the facts of the case, the judgment ought not to be sustained.

First. The piazza was a portion of the premises which some six years previously had been demised to, and for all that time had been occupied by, John Flynn, the father, as tenant. It constituted no part of the common passages or other appurtenances, or conveniences in a tenement house, over which it could be inferred or presumed the landlord retained an exclusive or general control, or over or upon which strangers or tenants in general were invited to pass.

The defect in the railing arose from natural decay, occurring during the tenancy, and perhaps there was sufficient evidence to show that the landlord by agreement was to make such repairs as were needed to keep them in tenantable condition.

Conceding however, such obligation rested on the defendant by virtue of the agreement for the letting of these premises, she was not, by reason thereof, responsible to the plaintiff for the injury she sustained. Under breach of a contract, the party in default is only liable to the party with whom or to whose benefit he has contracted, for such damages as naturally and according to the usual course of things arise from the breach, or which may reasonably be supposed to have been within the contemplation of the parties when the contract was made, as the probable result of its breach, but not for accidental, remote or consequential causes (*Sedg. on Damages*, 5th ed., 78; *Griffin agt. Culver*, 16 N. Y., 489; *Hamilton agt. McPherson*, 28 N. Y., 72; *Passenger agt. Thorburn*, 34 N. Y., 634).

This distinction is well illustrated by the case of *Hadley agt. Baxendale* (26 Eng. Com. Law & Eq., 398, S. C., 9 Exch., 341), (the principles of which have been adopted by our courts,) where plaintiff owner of a mill, verbally contracted with the defendant, a common carrier, to carry a broken shaft of the mill to an artificer at a distance, to serve as a model for a new shaft. Defendant violated his agreement to deliver the

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broken shaft within a reasonable time, in consequence of which a delay occurred in supplying the new shaft, and plaintiff having no other, the mill necessarily remained idle, and claim was made for the damages sustained from loss of profits incurred, from the mill standing idle for the period occasioned by the defendant's default.

The defendant, when contracting, knew of the mill standing idle, but not that the shaft he undertook to carry was to serve as a model for a new one.

The court held, that damages from the latter cause could not be recovered; that only such were recoverable as fairly entered into the minds of the parties, as naturally arising from a breach or which might reasonably have been in their contemplation when the contract was made as the probable result of its non-performance; that in the absence of notice of the particular circumstances of the case, or that plaintiff did not have another shaft, or that the mill was in no other respect defective, nor delayed from any other cause, the loss of profits for the period claimed was not the proximate or necessary result of a breach of the agreement.

In *Hargous agt. Ablon*, (5 *Hill*, 474), Judge COWEN, in illustrating this subject, says: "Doctor Franklin's case of the defective horse-shoe nail, which resulted in the loss of the shoe, and thence in the loss of the horse, is an excellent lesson in private economy, but in an action against the farrier, it would not have done to have looked beyond the loss of the shoe. To have charged him with accidental consequences, would have worked his ruin." "Besides, such a rule would have put his fortune in the power of his employer who might be careless of consequences, or even secretly aid in promoting them."

So in the present case, the natural and ordinary damages for breach of a general agreement to keep the premises in repair are the expenses of repair, are the expenses of repair and the loss of the use of the premises, while the party contracting was in default or during the making of the

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repairs and it could not have been contemplated that any special risk or accident resulting from any particular defect, or likely to occur from decay or want of repair in any particular part of the premises, was considered; and least of all was it likely they anticipated or had in thought or design, that the tenant, with full knowledge of the rotten or unsafe condition of any part of the premises, would expose himself, his wife, children or servant to any danger that might be threatened, of which he had full knowledge, and might avoid; or that it was the intention of the agreement that he or any member of his family should be insured or indemnified against all possible contingencies or casualties resulting from want of perfect repair in every portion of the premises.

In *Darwin agt. Pötter*, (5 Denio, 306), the supreme court held that the landlord who had demised farming lands with barns thereon, was not liable to his tenant on failure to fulfil such an agreement, for injury resulting to cows or young cattle; for increase of food, they required and decrease of their product, by reason of the state of the barns in question, but only for such sum as was necessary to place the barns in the condition in which they were to be put by the agreement, with interest.

In *Walker agt. Swaysee*, (3 Abb., 136), decided in 1856; it was announced as a doctrine of this court that the measure of damages in an action on such a covenant was "the amount it would cost to make such repairs; and for the reason that the tenant cannot, by exposing himself, his family or his goods to the injuries or damage which result from the landlord's neglect, present a meritorious claim, when he could remedy the evil by repairs for which he would be fully indemnified out of the rental."

In *Beach agt. Crane*, (2 Comst., 86), defendant had covenanted to erect and maintain a gate, between the public highway and plaintiff's land across, or over a private road granted him, and for default he was held liable for actual

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injury occasioned by cattle coming on to the land, in consequence of the removal of the gate.

Here the erection and maintenance of the gate was specially contracted for, and its sole object was the protection of the land from such inroads of stray cattle from the highway, the damages were properly held to result as a direct consequence of the breach.

In *Myers agt. Beach*, (39 N. Y., 269), the tenant was held entitled to recover, on such a covenant, the damages he had sustained from loss of the use of rooms in a hotel, caused by a defect in the flues of the chimney, while the landlord was in default; that the right to damages was not confined to the mere cost of the repairs, but that those resulting from the loss of use of the rooms, after the landlord had been notified of the necessity of repairs, were both certain and proximate.

In *Doupe agt. Genin*, (45 N. Y., 119), the court of appeals held that in respect to the obligations to make repairs, there was no distinction in the respective duties of landlord and tenant of parts of tenement houses, from those imposed by law upon parties occupying the same relation as to entire premises or parcels of land.

From these authorities it is clear, that the mere agreement of the landlord to repair, has reference only to the condition of the building or premises demised, for the purpose of their profitable use; and the pecuniary benefit to be derived from their enjoyment; or loss from being deprived of their use in such state of repair as the agreement intended.

Such a simple agreement or contract in no way contemplates any destruction of life or casualties to the person or property of any one, which might accidentally result from an omission to fulfil the agreement in every respect.

The only case referred to, as arising upon such an obligation and supposed to maintain a contrary doctrine, is that of *Johnson agt. Dixon*, (1 Daly, 178), decided in 1861; by a divided court without allusion to the principles previously announced in *Walker agt. Swayzee*, (5 Abb., 136).

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The majority of the court there held the owner of a stable, who had leased to the plaintiff the use of a horse-stall, was liable to his tenant for injury to a horse, resulting from neglect to repair the floor of the stable after notice of its defective condition.

The decision is not based upon any mere breach of agreement to repair, but as stated in the prevailing opinion, upon the "wrongful act or default of the landlord himself resulting from his promise, when informed of the fact, 'to attend to it' and thereby preventing the horse from being withdrawn and the accident prevented."

It is assumed in the case that the repairs "were necessary to be done, to make the stable secure and safe for the purpose for which it was used, and that as matter of fact, the (such) "obligation rested on the defendant to do it." If any such agreement, as is last above stated, existed, within the principles of the cases above cited, it warranted the judgment, as it was made with special reference to maintaining the stall in a secure and safe condition, for the horse to occupy it, and, no contributive negligence on the part of the plaintiff being shown, the recovery of damages resulting from a breach of a stipulation, having reference to the safety of the horse occupying the stall, was properly sustained.

This decision, on such facts, does not in any way impair or affect the law as previously announced in *Walker agt. Swayzee*.

There are some cases in which additional damages, besides those allowed for breach of contract on the principles above stated, have been awarded, upon the ground of its fraudulent violation (See *Dewitt agt. Wiltse*, 9 *Wend.*, 325; as explained by Judge COWEN, in *Blanchard agt. Ely*, 21 *Wend.*, 350); *Sedg. on Dam.*, 5th *Ed.*, 223, note i). Little progress has, however been made in the introduction of this element as ground for awarding additional damages for non-performance of a contract, as against the well established and certain rule for their assessment predicated upon the immediate

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pecuniary profit or advantage that would have resulted to the party contracted with, if fulfilled according to its legal force and effect (*Sedg. on Dam.*, 203, 208, *marg.*) But for the proposition that a landlord under contract (generally) to keep the premises in repair is for breach, also further liable to his tenant as in tort for wilful refusal or neglect to perform his obligation. No warrant is to be found in principle or authority. His subsequent parol promise, after being notified of defects, to make the necessary repairs, unless founded on a new consideration, superadds nothing to his original obligation (*Doupe agt. Genin*, 37 *How.*, 5), and furnishes no ground for awarding additional damages except so far as the tenant (the landlord not having actually commenced to make the repairs) is by such promise delayed and hindered in making them (primarily) at his own expense.* (*Turner agt. McCarthy*, 4 *E. D. Smith*, 547).

If the responsibility of the defendant, for the injury sustained by the plaintiff, is to be maintained, through force of

*NOTE. It would seem that notice of the breach of the contract to repair and the dangerous condition of the premises would be a sufficient consideration for the parol promise to repair the dilapidated premises; and that the landlord's neglect to fulfil his promise and make such repairs after such notice, constituted gross negligence. The tenant, it is true, might, on giving the landlord proper notice to repair in a specified time, make the repairs at his own expense and deduct it from the amount of the rent, but he was not obliged to do so, and it is always a hazardous business for the tenant, at best.

It is said that the promise of the landlord to repair, after notice from the tenant, of the defects superadds nothing to his original obligation; it may be that it adds nothing to the original covenant to repair, but the non-fulfilment of the promise adds the very important element of negligence to the landlord's liability.

It is also said that a claim cannot exist on the part and behalf of sufferers from such dilapidated premises, in an action for tort or negligence, against one whose only obligation exists in contract with the tenant in possession; this may be true, but when, as in this case, there is added to such obligatory contract, negligence, upon which the action is founded, it creates an additional obligation.

If it is intended to be held that in no event can negligence be predicated of a promise of the landlord to repair, then there ought to have been a nonsuit in this case, as the action was wrongly brought for negligence. If the action is properly brought, founded on negligence, there would seem to be no difficulty in recovering damages, remote and consequential as well as immediate and proximate.

But it is presumed that this case was decided (and perhaps properly so) on the ground of contributive negligence on the part of the plaintiff.—RMR.

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subrogation to the benefits of her personal obligation to her tenant to make repairs, there is no foundation for this claim; since the general covenant or agreement to repair had no reference to such an accident. Neither the case stated in the complaint, nor that made by the proof, is based upon any such obligation by way of contract, and the defendant must be held liable, if at all, in tort (as claimed in the complaint) upon some legal obligation or duty to the plaintiff outside of any such agreement. If the plaintiff, a stranger to the landlord's agreement to repair, can avail herself of its obligation (to which I do not assent) her rights under it cannot extend beyond those which it legally assured to the tenant; and as none would have been awarded to him, had he been the sufferer, in this case none can accrue to the plaintiff, claiming through or under him.

Secondly. There is no evidence that the railing of the piazza, when the premises were leased to John Flynn (the father) was in a dangerous condition or threatened any injury to any one.

Its deterioration or dilapidation (so far as appears) arose several years after the letting, and from natural causes or through defects thereafter occurring from natural wear and decay.

A claim cannot exist on the part on behalf of sufferers from such causes, in an action for tort or negligence against one whose only obligation exists in contract with the tenant in possession, and one can only be founded on some other negligence, trespass or wilful breach of a direct public or private duty to the party injured.

In the present case, the defendant had no relations with the plaintiff, either by contract, or public or private obligation in reference to this balcony or piazza, and owed no duty to her to keep and maintain its railing in a safe condition (*O'Brien agt. Capwell*, 59 Barb. 504).

But, *Thirdly.* Even if any obligation existed on the part of the defendant as landlady, growing out of her duty *sic*

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utere tuo ut alienum non lædas, the case presented, is not one authorizing this recovery.

The negligence of the parents, in suffering the plaintiff to wander upon this balcony, and exposing her to the danger which they had for two years known and apprehended, was so gross and unambiguous, as to constitute contributive negligence, and should have prevented any recovery.

There was no contradiction or qualification to the force of the statements of plaintiff's parents and witnesses on her behalf, of their knowledge of the precarious condition of the balcony, or of their full apprehension of the hazard, to which any one was exposed by coming out upon it.

Where danger of injury being inflicted is to be apprehended and consequences to result from the act or default of a party is likely to be serious, the highest degree of precaution and vigilance must be exercised (*Kelsey agt. Barney*, 12 N. Y., 425), and if through neglect of this duty, which the law imposes on the party injured, of making reasonable exertions to render the injury as light as possible, the damages are unnecessarily enlarged, the increased loss falls on him (*Hamilton agt. McPherson*, 28 N. Y., 72).

Possessing, as the parents of this child did, knowledge of the dangerous condition of this piazza, they do not appear to have taken any, or the slightest, precaution to keep it away from the danger, or to protect it from the known risk of playing or interfering with these insecure railings; but through forgetfulness or inattention of the mother it was allowed to stroll out, and expose itself to the apprehended calamity, and it suffered such consequences as might reasonably have been expected. To permit this child of two or three years of age to unconsciously rush into such a hazard, constituted gross negligence; as much so, as if it had been suffered to remain unattended, at an open window, which the landlord had neglected to supply with window sash, or other guards against it falling out of it.

The undisputed facts constitute a clear cause of contrib-

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utory negligence on the part of the parents, in charge of a child too young to exercise discretion to avoid such a danger.

The rights of recovery of a child are controlled by the neglect of its parents, to the same extent as if it were capable of governing its own conduct, and had been equally neglectful (*Sher. & Red. on Negligence*, §§ 66, 37, 48; *Honegsberger agt. Second Av. R.R. Co.*, in court of appeals 33 *How.*, 193, overruling *S. C.*, 1 *Daly*, 89).

The injury arose from no culpable or aggressive act of the defendant, but could at most be claimed to have happened (remotely) through her breach of contract with another.

Under these circumstances the motion to dismiss the complaint should have been granted; and as well on that account, as for the absence of any legal responsibility on the part of the defendant for the matters complained of, the judgment should be reversed.

I concur, R. L. LARREMORE.

DALY, Ch. J., dissenting.

Lindsley agt. Diefendorf.

SUPREME COURT.

ISAAC M. LINDSLEY, administrator of ALMON LINDSLEY agt.
SOLOMON DIEFENDORF, FREDERICK DIEFENDORF.

A county bond issued to the obligee or bearer possesses all the elements of commercial paper, and is subject to all the rules which pertain to commercial paper, and a purchaser and holder thereof, is entitled to all the rights which attach to negotiable instruments.

A purchaser of such a bond, in good faith, for full value, and without notice, possesses a perfect title thereto by delivery.

An action and an injunction order restraining the party in possession of such bond from negotiating or disposing of it, is not notice to a subsequent bona fide purchaser for value, in the nature of *lis pendens* at common law, as such notice does not apply to commercial paper, the title to which passes from hand to hand by delivery.

Oswego Circuit, July, 1872.

JURY waived, and tried before the court.

Almon Lindsley died intestate, May 10, 1867.

Letters of administration were issued May 14, 1867, to Isaac M. Lindsley, plaintiff.

An action was brought by the plaintiff, as administrator, against Almon E. Lindsley to recover possession of certain securities of the deceased, among which was the Oswego county bond, numbered 224, for \$500. The summons and complaint were personally served 18th May, 1867, and the same day a copy of an injunction order on that suit restraining the disposal of said securities, was served on Almon E. Lindsley.

Issue was joined on that action, and it was referred, and resulted in a judgment in favor of the plaintiff, entered January 30, 1869, declaring the bill of sale of 6th March, 1867, executed to Almon E. Lindsley by his father, Almon

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Lindsley, void, and that no title passed to said securities, and that the administrator was entitled to the possession thereof, or a judgment for their value. March 6, 1868, in Parish, the said Almon E. Lindsley in company with Mary McKinny called upon the defendants and offered to sell the Oswego County bond, number 224, and said Mary produced the bond and negotiated the sale thereof to Heelly B. Eldred, an aged widow lady, then residing with the defendants.

Mrs. Eldred purchased the bond for full value, and without any express notice, information or knowledge of any infirmity in the title of the party offering and selling the same to her, and she retained possession thereof until March 28, 1870, when she caused the same to be delivered to the Merchants' Union Express Co., at Mexico, to be presented in New York, for payment at the place where the same was made payable.

The express company collected the bond and returned the proceeds thereof to its agent at Mexico, and while in his possession said proceeds were taken, in virtue of replevin papers in this action, by the sheriff, and this action involves the title to said proceeds of said bond.

The bond was issued 1st October, 1864, by the county of Oswego, pursuant to chapter 886 of the laws of 1864, payable April 1, 1870, and was sealed with the seal of said county, and made payable to Almon Lindsley or bearer, and had attached ordinary warrants for interest.

J. C. CHURCHELL, *for plaintiff.*

CYRUS WHITNEY, *for defendant.*

HARDIN, J.—By section 6, of chapter 8, of the laws of 1864, the bond (the proceeds of which are involved in this action) was authorized, and was issued payable April 1, 1870, and was made payable to the name of the obligee or bearer.

It was negotiable by delivery, and was of a class of securities that of later years have become very numerous, passing

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from hand to hand by delivery, and sold openly in the market daily.

It possessed all the elements of commercial paper, and is subject to all the rules which pertain to commercial paper, and purchasers and holders thereof are entitled to all the rights which attach to negotiable instruments.

These principles are too well settled by authority in this state to admit of discussion or question (8 *Paige*, 527; 2 *Hill*, 159; 21 *How. U. S.*, 575; 10 *Bosw.*, 332; 19 *N. Y.*, 20; 22 *N. Y.*, 114; 25 *N. Y.*, 496).

The principles which have been established as to commercial paper were restated, and the stringency of the rules reasserted by the court of appeals in 1866, (34 *N. Y.*, 247).

The purchase of the bond in question by Mrs. Eldred, being for full value, and without any notice or knowledge of an infirmity in the title, she became the owner thereof *bona fide*, and the question whether she took it with due care and caution does not arise (34 *Barb.*, 436 & 443; 34 *N. Y.*, 247).

And being a purchaser in good faith, she acquired the title to the bond, even against the plaintiff (39 *N. Y.* 446; 40 *N. Y.*, 456).

But the plaintiff insists that the action brought by him against Almon E. Lindsley, and the injunction order and proceedings therein, were a notice to the purchaser, and invokes the principle of *pendente lite nihil innovitur*, but that cannot aid the plaintiff.

By the Code, section 132, *lis pendens* may be filed in actions relating to real estate.

But by common law *lis pendens* applies to all estates, and is a general notice of an equity to all the world.

It was a rule adopted for great public utility, and its application sometimes produces great hardship, nevertheless, in all cases coming within its principles, it is the duty of the court to apply it (1 *Johns. Ch.*, 576), and this principle is in harmony with the doctrine, that a purchaser of a chose in

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action takes it subject to all the equities it was subjected to in the hands of the assignor.

Recognizing the general principle cited by the plaintiff's counsel, and as it is fully stated in 1 *Johns. Ch.*, 576, & 2 *Johns. Ch.*, 541, and reaffirmed in the very learned opinion of Mr. Justice FOSTER in 48 *Barb.*, 640; yet, it must be deemed inapplicable to this case. It does not apply to purchasers of negotiable paper.

No case has been cited by the learned counsel for the plaintiff where it was applied to that class of securities.

The case in 48 *Barb.*, 640, was in reference to bank stock. It is now well settled that stocks of that kind are not within the principles applicable to bonds like the one involved in this action. Certificates of stock do not possess the character of negotiable instruments, and the purchasers thereof take the same subject to the equities which existed and might have been available against the assignor (*Mechanics' Bank agt. New Haven R.R. Co.*, 3 *Kern.*, 600).

The equities attend the title though transferred to a subsequent assignee for value and without notice (*Bush agt. Lathrop*, 22 *N. Y.*, 535; *Mason agt. Lord*, 40 *N. Y.*, 487; *Bullard agt. Burgitt*, 40 *N. Y.*, 314; *McNeel agt. Tenth National Bank*, 55 *Barb.*, 59).

Though this latter case has been lately reversed by the court of appeals, it is not upon the proposition applicable in this case (46 *N. Y.*, 325).

It follows, therefore, that the plaintiff has failed to show actual or constructive notice to Mrs. Eldred, and that she got a good and valid title in the bond so purchased by her, and the defendants as her agents were entitled to possession of the proceeds thereof, discharged of any claim thereto by the plaintiff, and that judgment in this action must be given for the defendants.

Buck agt. The City of Lockport.

SUPREME COURT.

JOHN L. BUCK, respondent, agt. THE CITY OF LOCKPORT,
appellant.

Where a *municipal corporation* (the city of Lockport) enters into a contract with an individual, for the payment to him of a specific sum of money, on a certain day, and after it becomes due they neglect or refuse to put the proper machinery in motion to raise the necessary funds, or to put the claim presented in the proper shape for liquidation and payment, within a proper time, the law gives the creditor his remedy *by action*, to compel payment. He is not compelled to resort to proceedings by *mandamus*.

A municipal corporation does not stand in respect to such claims on the same footing with counties of the state where the only remedy of a creditor of this kind is by *mandamus*.

The principle applicable, in such cases, to counties has never been extended to village or city corporations, existing and acting under special charter.

Fourth Judicial Department, General Term, May, 1872.

Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.

THIS is an appeal from a judgment of the county court of Niagara county, affirming the judgment of a justice's court.

JOHN L. BUCK, *respondent in person*.

JAMES F. FITTS, *for appellant*.

By the court, JOHNSON, J.—The action was upon a contract between the plaintiff and the common council of the city, by which the former rented to the latter certain premises to be used as a pound for the impounding of animals by the corporation. The contract was concluded on the 14th of June, 1869. The rent agreed upon was \$25, to be paid the 1st of January, 1870. On the 4th of April, 1870, the plaintiff presented his claim for the rent, to the common

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council of the city, and it was by them referred to the committee of that body on accounts.

Nothing more was done with it, and on the 4th of November following, the plaintiff again presented the same account in due form. No order of the common council was made for the payment of the claim, nor warrant drawn upon the treasurer according to the provisions of the charter, and the plaintiff failed wholly to obtain payment by that means.

This action was commenced on the 26th of November, 1870, nearly eleven months after the demand had become due and payable by the terms of the agreement. By the city charter, the common council are authorized to provide and establish a public pound.

On the part of the defendant it was shown, that the common council on the 12th of July, 1869, caused the annual tax to be levied for the payment of expenses and claims to the amount of \$16,500, which was the full amount they were authorized to raise in that way, by the charter, which amount was collected and paid into the treasury, and that the sum of \$8,120 82 was received and paid into the treasury from other sources. It was further shown, that on the 1st of January, 1870, the general funds in the treasury had been overdrawn and so continued through the fiscal year, and that on the 12th of September, 1870, the common council again by resolution caused to be levied the sum of \$16,500, in pursuance of their powers under the charter.

By the charter it is provided, that all accounts and claims against the city shall be presented to the common council, and that the same shall by that body be referred to the standing committee on accounts, whose duty it is to examine into said accounts, and report thereon to the common council, either favorably or adversely, with their reasons; and the common council is then to hear, examine and determine the same in like manner as a board of town auditors. If the claim is allowed, or any part thereof, the common council is then to make an order for its payment, upon which the clerk of

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that body draws and signs a warrant on the treasurer which is to be countersigned by the mayor of the city, before the amount allowed can be paid.

It is contended on behalf of the defendant, that an action for a demand or claim of this kind, cannot be maintained against the corporation, that the city stands in respect to such claims, on the same footing with counties of the state, and that the only remedy of a creditor of this kind, is by *mandamus*, to compel the common council to proceed and examine and allow the claim, and make the order for its payment. In respect to counties, it has been held that an action for such a cause cannot be maintained, but that the remedy of a party is by *mandamus* to compel the board of supervisors to discharge the duty which the law imposes upon it, in regard to claims against their county. This is upon the ground that counties are political divisions of the state, possessing and exercising a measure of its sovereignty, and that the only means the law has provided for the payment and satisfaction of such claims against the county, is to have them presented to the board of supervisors, who are required to "examine, settle and allow" all such as are chargeable against the county, and "direct the raising of such sums as may be necessary to defray the same" by tax (*Bradly agt. The Supervisors of New York*, 2 *Sandf.*, 460, *S. C.*, 10 *N. Y.*, 260; *Martin agt. Supervisors of Greene Co.*, 29 *N. Y.*, 645; *People agt. Supervisors of New York*, 32 *N. Y.*, 473; *People agt. Supervisors of Delaware Co.*, 45 *N. Y.*, 196; *McClure agt. Board of Supervisors of Niagara Co.*, 50 *Barb.*, 594). This rule is founded in considerations of public policy and expediency, and proceeds upon the same principle with that which refuses to allow an individual citizen to have a right of action against the state for claims against it, but provides for the payment of all such claims by means of official audit, appropriation act, taxation, and warrants upon the treasurer. But this principle has never been fully extended to village or city corporations existing and acting under special char-

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ters. In respect to such corporations the rule extends no further than to exempt them from liability to action for the recovery of such claims, primarily, or in the first instance.

The law presumes in respect to all such claims, that they are contracted or created, in reference to the power of the corporation and the ways and means at its command of obtaining funds for payment, and will not allow such bodies to be harrassed by actions, unless they refuse, or fail, to exercise their powers, or to use the means at their command to enable them to make payment and satisfaction in the prescribed form.

But if they refuse or neglect to put the proper machinery in motion to raise the necessary funds, or to put the claims presented in the proper shape for liquidation and payment, then the law gives the creditor his remedy by action to compel payment. This rule has been established, and is illustrated by many decisions in the courts of this state (*McCulloch agt. The Mayor, &c., of Brooklyn*, 23 Wend., 459; *Cumming agt. The Mayor, &c., of Brooklyn*, 11 Paige, 596; *Beard agt. The City of Brooklyn*, 31 Barb., 142; *Ganson agt. The City of Buffalo*, 1 Keyes, 454; *Baldwin agt. The City of Oswego*, 2 Keyes, 132). Here it must be admitted, the common council have been guilty of great delay and negligence, or worse, in omitting to put the plaintiff's claim in a proper shape to render it payable in the ordinary and usual way, after it was presented.

There was, in fact, nothing for them to do but to order its payment. The contract was between the plaintiff and that body, and the amount and time of payment fixed by the contract.

They had no right to disallow it (*People agt. Supervisors of Delaware Co.*, 45 N. Y., 196), and it was their clear duty to make the order on which a warrant could have been drawn, when the claim was first presented. It had then been due over three months. After the debt was contracted there had been two annual tax levies, before this action was

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brought, and the common council though twice applied to, had neglected to act upon the claim, and to put it in a condition to be properly paid from the city treasury. The corporation cannot thus keep its creditors at bay, and thus defend itself, on the ground that its own officers and agents have not done what it was their duty to do.

If it should be conceded that the plaintiff here might have proceeded by *mandamus*, to compel the common council to allow the claim, and make the necessary order for its payment, it would not follow that this action cannot be maintained. There is an exception to the general rule that a *mandamus* will not lie when the party has another remedy in the case of corporations and ministerial officers.

They may be compelled to exercise their functions according to law by *mandamus*, even though the party has another remedy against them by action for neglect of duty (*McCulloch* agt. *Mayor of Brooklyn*, 23 *Wend.*, 461). We think, the action was properly brought, and that the judgment should be affirmed.

NOTE.—The acts of the legislature relating to the city of Lockport are chapter 365, laws of 1865; chapter 809, laws of 1868; chapter 835, laws of 1869.

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SUPREME COURT.

BRIDGET WALKER, respondent, agt. THE CITY OF LOCKPORT,
appellant.

A defective and dangerous cross-walk in a street in the city of Lockport, whereby a citizen sustained personal injuries, was presumptively a construction by the city. But if it was not, it was an obstruction in a public highway, the duty to keep which in a proper and safe condition devolved upon the city.

Express notice of the dangerous condition of a cross-walk or a street is not necessary to be given to the city authorities, where ample time has elapsed to render the condition notorious.

Fourth Department, June Term, 1872.

Before JOHNSON and TALCOTT, JJ.

APPEAL from an order of the special term of Erie county, denying a new trial.

JAS. F. FITTS, *for appellant.*

S. W. LOCKWOOD, *for respondent.*

By the court, TALCOTT, J.—This action is brought to recover damages for an injury sustained by the plaintiff in consequence of an obstruction in the cross-walk upon one of the streets in the city of Lockport over which the plaintiff fell and broke her arm. On the question of fact relating to the character of the obstruction and the alleged contributory negligence of the plaintiff, the evidence clearly sustains the verdict. Most of the questions of law presented by the appellant, were decided by this court, in *Hines agt. City of Lockport*, (60 Barb., 378). In this case, the appellant claims that no express proof was given that the cross-walk in question was ever built or accepted by the

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city. It was in a public highway, under the charge of the city authorities, and had existed there for some years, presumptively it was constructed by or under the authority of the city. If not, it was an obstruction in a public highway; the duty to keep which in a proper and safe condition, devolves upon the defendant.

In *Hines agt. City of Lockport*, (60 Barb., 378), we held, that the defendant had control of the whole space set apart as a street, and it was their duty to keep such space in repair, and that whether or not it was the duty of the authorities to construct cross-walks or not, it is their duty to keep in repair those parts of the street in which such cross-walks exist, so that the same shall be safe for pedestrians as well as others.

It is also claimed by the appellant's counsel, that no express notice was given to the common council of the existence of this dangerous obstruction.

But the case shows, that the attention of the street superintendant was repeatedly called to this obstruction and its dangerous character. The superintendant of streets was the proper officer of the city to whom to give notice.

The matter was within the purview of his powers and duties, and notice to him was notice to the defendant.

This notice was given in the fall of 1869. The injury for which the suit is brought occurred in April, 1870.

Express notice is not necessary where ample time has elapsed to render the defect notorious (*Requa agt. City of Rochester*, 45 N. Y., 129). In the case cited no notice was shown, and the defect had existed but three weeks, yet the city was held liable upon the ground that the lapse of time amounted to constructive notice.

The order denying a new trial must be affirmed.

NOTE.—The acts of the legislature relating to the city of Lockport, are chapter 365, laws of 1865; chapter 809, laws of 1868; chapter 835, laws of 1869.

Webber agt. The City of Lockport.

NIAGARA COUNTY COURT.

MARVIN H. WEBBER, appellant, agt. THE COMMON COUNCIL
OF THE CITY OF LOCKPORT.

Under the charter of the city of Lockport, an objection to an assessment for the repair of a sewer, which extended the repair a distance of sixty feet beyond which the ordinance directed, *held*, not sustainable :

Held, also, that the objection that the work could not be done except by contract, and after receiving proposals, was not well taken :

Held, also that the objection that the work could not be done until after an assessment for its cost was unavailable :

Held, also that the objection that the territory benefited, &c., was not sufficiently described in the ordinance, was untenable :

Held, also that the objection that the principle on which the assessment was made was wrong and unjust, was unavailable :

Held, that the objection that a large amount of property stated in the return to be of the value of \$24,000, was not assessed at all, for the reason that it was doubtful whether it could be assessed—being mostly, school, church and city property, was fatal to the assessment :

Held, also that the objection that in many cases the parcels of real estate attempted to be assessed, were so imperfectly described that they could not be sufficiently identified, was also fatal to the assessment.

Adjourned Term, June, 1872.

APPEAL from assessment in enlarging, &c., a sewer, on Pine street.

G. W. BOWEN, *for appellant.*

JAMES F. FITTS, *for respondent.*

GARDNER, *County Judge*,—*First.* It is objected by the appellant that the assessment is irregular and void for the reason that the ordinance for the work only directed the repairs of the sewer from at or near Race street to the Hydraulic Race, a distance, commencing at the south line of

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Race street of about two hundred and twenty feet, whereas the work done, and for which the assessment was made, extended to Main street, increasing the distance sixty feet.

The charter, title 3, section 8, subdivision 1, is quite general in its delegation of authority to the council on this subject, it is "to make or order, and direct the making of drains, sewers, gutters," &c.

It is probably true, as shown, that the council can only speak or make known its orders and directions by writing, but the form in which, and time when, that shall be done is not specified. In this case, it is true, the first resolution of the council, describe the work to be done as being between the Race, and a point at or near Race street. The return shows, however, that on entering upon the work it was found necessary to continue it to Main street, which was done by the agencies of the corporation, and when done was reported in its whole extent with its cost to the council which adopted the report and directed an assessment to be made for said expenses, and on the assessment being made, specifying on its face the extent of the improvement, from the Race to Main street, confirmed the same.

These proceedings under the tendency of the decisions on this question (See 17 N. Y., 449 ; 8 N. Y., 120, &c.), it is believed will be held a sufficient order and direction for the work, to sustain the proceedings to collect the compensation for it. It may be said, too, without any very strained construction, that the extent to Main street was within the terms of the resolution. The subject of the resolution was the repairs of a sewer forty or more rods in length. The repairs were to commence at or near Race street. They in fact, commenced at Main street, sixty feet from Race street. It can hardly be said that distance was at such a remove from the named point as that it cannot, looking at the extent of the work and the length of the sewer, be regarded as near it.

Second. The objection, that the work could not be done

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except by contract, and after receiving proposals is not well taken. The necessity of this course in the opinion of the council, as contemplated by section 21 of title 5, of the charter, is presumed by the action of the council, and without any express declaration to that effect (7 *Cow.*, 585; 21 *N. Y.*, 517, &c.)

Third. The objection, that the work could not be done until after an assessment for its cost is also unavailable. The charter (section 1, title 6) on this subject, is declaratory only, and the validity of the assessment is not effected by its non-observance (*Doughty* agt. *Hope*, 3 *Denio*, 249; also 5 *Barb.*, 43; also 37 *N. Y.*, 267).

Fourth. The appellant's further objection, that the territory benefited, &c., is not sufficiently described in the ordinance for that purpose, is also untenable. If necessary, the two ordinances for this purpose, the one for the reconstruction of the sewer in 1866, and the present repairs should, upon the reference of the latter to the former be read together. If so read, there is no uncertainty in the description.

It has also been held, that the confirmation by the council of the assessment after that is made, is a sufficient designation of the territory benefited (*Manice*, &c. agt. *New York*, 8 *N. Y.*, 120; *opinion*, 130 & 131).

Fifth. Under the decisions, too, the objection, that the principle on which the assessment was made is wrong and unjust to the appellant and others, must be held unavailable. It is true, as it seems to me, injustice has been done by the adoption of the general and arbitrary rule acted upon by the assessors by which certain property owners, quite remote comparatively, and having no direct communication with the sewer, are made to pay equally with those in the immediate vicinity, and directly connected with it. But under the decisions, these questions must be held to be within the uncontrollable discretion of the assessors, and not open to review on appeal (15 *Wend.*, 374; 28 *Barb.*, 609; case of *Gardner* agt. *Common Council of Lockport*, opinion of MARVIN, J., 41

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How., 255). In this case too, the assessors have in two or three cases, varied from the general rule, and exercised their judgment as to the benefit to each owner.

The remaining two objections, I think, should be held fatal to the assessment:

Sixth. One is, that a large amount of property stated in the return to be of the value of \$24,000, was not assessed at all, for the reason, as the return states, that it was doubted whether it could be assessed. It is true, most of the property omitted is school, church, and city property. The ownership of the property, however, makes no difference in the just claim upon each parcel to contribute to the payment for that from which its value has been increased, or the property benefited. The exemptions under the general tax laws do not include such claims for contribution to pay for benefits received. It is claimed, and with some plausibility, that the school house property (belonging it is supposed, this the return does not show, to the union school district in the city of Lockport), is exempt from local assessment under the law (chapter 57, laws of 1847), establishing such school district. It is true, section 23 of said chapter, declares that the school houses, lots, &c., of said district "shall be exempt from all taxes and assessments." Does the terms "taxes and assessments" include assessments for purposes of this kind? The word assessments, as used in the charter of the city, in connection with improvements of the kind in question, means the apportionment of the cost of the improvement upon the real estate benefited, or in other words, the payment of the cost of a benefit conferred. If such words were used to convey the idea thus conveyed by the term assessment, it would not, probably be claimed, that it was the intention by the term "taxes and assessments" in the school laws referred to, to exempt the school house, &c., from such payments. Buildings for public worship, school houses, &c., are exempt from taxation by the R. S., (1st R. S., *marg.* p. 388). In the same statutes, the term, assessment, is used in connection

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with and concerning the imposition of taxes. Does it mean anything more in the section 23 of the school law referred to? I think not. I think, it was not intended to extend the exemption of the school house, &c., of the school district in Lockport, beyond that of such houses generally in the state.

If not, then the exemption only extends to the payment of taxes as such, and as a consequence within the decisions does not include assessments for the purposes under consideration (*Matter of Mayor, &c., of New York*, 11 Johns., 78; *Matter of Church Street in New York*, 49 Barb., 455; *Matter of Petition of Geo. C. Turfler*, 44 Barb., 46).

Seventh. The other objection deemed fatal to the assessment, is, that in many cases the parcels of real estate attempted to be assessed, are so imperfectly described as that they cannot be sufficiently identified. These cases are set forth in paper "B," annexed to the return, by reference to which it is seen that the attempted descriptions, or most of them, fail to so define any parcel of land that it would be impossible to enforce the assessment by sales for non-payment of the assessment. In the cases referred to no title could be made by such sales (*Bayard, &c. agt. Healy*, 20 Johns., 495; *Cumming agt. Mayor of Brooklyn*, 11 Paige, 596). This inadequacy of description is not denied by the counsel for the council, but it is insisted that the appellant cannot take advantage of it, because as is claimed, he cannot be prejudiced by it. But is that so? It is the right of all persons assessed to be able to judge whether the assessment is proportionate and just. To this end it is important to know what parcels of land, quantity, &c., are assessed. How can this be known when the description is "part of a lot" without giving the number of feet, or in any way indicating the quantity, as is the case with several of the descriptions in question. It is the real estate, not the person that is assessed. The real estate should, therefore, be described. And how can the council in passing upon the justice of the assessment, or the

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appellate court in its review determine the fairness of the principle adopted by the assessors. Again, if title cannot be made on sale for non-payment of the assessment, one of the next important means for collecting the assessment is unavailable. To that extent, and in all cases where the assessment cannot be collected by the measures named, it is as if no assessment had been made. It seems to be supposed that if by reason of the non-collection of the amount assessed, or any part of it, there is a deficiency, no further assessment can be made. I do not so understand it. The charter, section 12, title 6, (amendment of '69,) provides, that in case any assessment shall prove insufficient to defray the expenses, &c., the council may direct a further assessment for the deficiency.

It is probable too, in the absence of such express authority the councils being authorized by the charter to make such improvements, and assess and collect the cost upon the property benefited, has the power to repeat the process if for any cause, unless perhaps, by some actual wrong of the council they fail to collect the necessary amount by the first assessment (*Meech agt. Buffalo*, 29 N. Y., 188). If, by mistake one or more parcels of land should be assessed twice, and but half the amount thereof collected, or if by mistake a parcel is described that does not, in fact, exist, is there any doubt but a second assessment could be made for the deficiency thus occurring? So in this case, there is no land described in some of these assessments, and who can say what land, or that any has been assessed.

If there is a failure for any cause to raise the amount necessary, the deficiency must be paid either by a second assessment or out of the general fund, and in either case the appellant is interested as a property owner. Each of the owners made liable to contribute to the fund to pay for the improvement, are interested in having the proceedings against the others, such as will, if necessary, enforce the payment of their proportion, and if there is a material failure by

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reason of defects in the assessment to accomplish that object. I think, any of the parties in interest may appeal.

For the two reasons last considered, this assessment is held defective, and the defects being such that they can only be remedied by a new assessment, this must be set aside, and a new one ordered.

NOTE. The acts relating to the city and village of Lockport, referred to in the foregoing opinion, are chapter 365, laws of 1865; chapter 809, laws of 1868; chapter 835, laws of 1869; chapter 307, laws of 1846.

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SUPREME COURT.

GAMBLE agt. TAYLOR.

Whenever a party obtains the postponement of the trial of a cause, *on payment of costs*, his adversary may insist on having the trial proceed, on omission to pay; or he may waive that right, and either compel payment by precept in the nature of a *feri facias*, or include them in his general bill, in case he ultimately succeeds in the action.

Where the defendant put the cause over the circuit upon an order "that said cause go over the term, on payment of costs by said defendant, to the plaintiff or her attorney, of said term, and witnesses fees," and the defendant thereafter paid to plaintiff's attorney \$10 50-100 which was all the term costs, except witnesses fees, which were left for future adjustment, and on such adjustment by the court, such fees were fixed at \$50, and the plaintiff having ultimately succeeded in the action:

Held, that the plaintiff was entitled to have the balance of the costs of the circuit \$50, included in the judgment, as part of the costs in the action—ordered accordingly.

Saratoga Special Term, May, 1872.

MOTION for re-adjustment of costs, and for general relief.

This action was on the calendar for trial at the June circuit, 1870, in Washington County, and was put over the circuit on defendant's application on payment of costs.

The order entered in the minutes of the court, was as follows. "This cause having been moved by defendant's attorney to be put over the term by affidavit: Ordered that said cause go over the term, on payment of costs by said defendant, to the plaintiff or her attorney, of said term, and witnesses fees." The case went over the circuit on this order, and the defendant afterwards paid ten dollars and fifty cents on the costs. No further payment of costs was made, and ultimately, at a circuit in 1871, the case was tried, and the plaintiff recovered judgment for damages and costs of the action. The plaintiff demanded and claimed the balance of

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the costs of said June circuit over the \$10 50. The items claimed to be payable under the order were as follows: Term fee \$10; sheriff's fee 50; witnesses' fees \$50 80. The controversy, is in fact, in regard to the witnesses' fees.

This claim, the defendant resisted, and the plaintiff now moves for an order directing the clerk to adjust and allow the plaintiff, the costs of said June circuit, which have not been paid, and to correct the entry of judgment so as to include them in the recovery, or for such other or further order as should seem just.

The defendant resists the claim and opposes this motion, *first*, on the ground that the plaintiff cannot now insist on performance of the condition imposed by the order; but should have proceeded with the trial, if the costs were not paid; *secondly*, that the \$10 50 paid, actually covered all the costs of the circuit, it being claimed that no witnesses attended, or were subpoenaed to attend that circuit; and *thirdly*, that \$10 50 were accepted by the plaintiff's attorney in full payment of the costs required by the condition of the order. Other facts than those above stated and necessary to the full consideration of the case, appear in the following opinion.

MR. SHERMAN, *for plaintiff.*

MR. NOBLE, *for defendant.*

BOCKES, J.—*First.* It is undoubtedly true, that the plaintiff might have insisted on the trial of the case at the circuit, on non-compliance by the defendant with the condition of the order. But the defendant, having taken the benefit of it, was bound afterwards to the performance of the condition. Such has been the settled rule in this state for a great number of years (19 *Johns.*, 270; 1 *Wend.*, 83; 2 *Wend.*, 266; 18 *Wend.*, 509; 1 *Denio*, 631; 5 *Hill*, 561; 2 *Sandf.*, 735). In the last case cited, the decisions on this subject were examined, and it was held, that when a party obtains the

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postponement of a trial, on payment of costs, the adverse party may, on the omission of the former to pay them, insist on having the trial proceed, or he may waive that right, and the court, on motion, will compel payment. Formerly, an attachment would be granted to enforce payment (19 *Johns.*, 270; 18 *Wend.*, 509).

At the present time, a precept in the nature of a *feri facias* may issue (*Laws of 1840*, p. 333, § 15; *Laws of 1847*, p. 491, chap. 390; 1 *Denio*, 631; 6 *How.*, 121).

If collection be not enforced until a trial is had, such costs may be included in the general bill, and taxed as a part of the costs of the action (2 *Wend.*, 286; 2 *Sandf.*, 735). The purport of the decisions in the cases cited then is, that when a party obtains a postponement of the trial of a cause, on payment of costs, his adversary may insist on having the trial proceed, on omission to pay; or he may waive that right, and either compel payment by precept in the nature of a *feri facias*, or include them in his general bill in case he ultimately succeeds in the action. If, therefore, the costs of the June circuit in this case have not been paid, the plaintiff is now entitled either to a precept to enforce payment, or to have them included in his general bill, and to collect them under his judgment herein.

Second. Ten dollars and fifty cents were paid some time after the circuit. Did this amount cover the entire costs required to be paid by the terms of the order? It did if no witnesses' fees were properly chargeable against the defendant for that circuit. But the plaintiff swears unqualifiedly, that the two witnesses named in the bill of costs were duly and in good faith subpoenaed to attend that circuit as witnesses for her, that they did actually attend the circuit as witnesses in her behalf, two days each; that they were necessary and material, and traveled from their residence, to attend as such witnesses, the number of miles charged. The plaintiff's statement is also corroborated by the affidavit of one of the witnesses who swears that he was subpoenaed

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and attended as a witness. There is no direct evidence before me on this motion to countervail this statement. The defendant and his attorney understood that there were no witnesses in attendance, and the source of their information is given. But there is not sufficient countervailing proof to overcome the unequivocal averment of the plaintiff, that the witnesses were subpoenaed and attended. Especially, as she is corroborated fully by one of the witnesses, as to the fact, that he was subpoenaed and attended as she avers. The affidavits submitted establish by a strong preponderance of proof, the correctness of the charge for witnesses' fees claimed in the bill.

Thirdly. It now remains to be determined whether the \$10 50 were accepted by the plaintiff's attorney in satisfaction of the costs imposed by the order postponing the trial. It seems to me, that the letter itself, which accompanied the payment of the \$10 50 settles this question beyond peradventure.

The plaintiff's attorney wrote the defendant's attorney, asking payment of the costs due by the terms of the order, for term fees and witnesses' fees. Thereupon the defendant's attorney replied, sending \$10 50, and after suggesting, that no witnesses had attended, stated as follows: "We enclose \$10 50, and if, on adjustment, Mrs. Gamble is entitled to any more she shall have it." The \$10 50 was paid and accepted upon this promise, and no further payment has been made, nor has there been any other arrangement relating to the matter. Thus the witnesses' fees were left to be thereafter adjusted. It is true, the plaintiff's attorney in his letter, called for only \$15 witnesses' fees; but he explains this in his affidavit wherein he states, that he did not know at that time how many witnesses the plaintiff had in attendance at the circuit, and that he supposed when the case should be closed, all would be made right. All this, however, is of little or no importance, inasmuch as the fact remains uncontroverted, that only the term fee of ten dollars and sheriff's fee of fifty

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cents were paid; and that such payment was accompanied by a promise in substance and effect, that the witnesses' fees should be thereafter paid, in case it should be made to appear that there were any legal expenses for witnesses incurred.

This case before me is, therefore, brought to this, that under the order postponing the trial, the plaintiff was entitled to the costs of the circuit, amounting to \$60 50; that but \$10 50 of this sum have been paid; that the balance remains due; and further, that the plaintiff is now entitled either to a precept in the nature of a *fiery facias* to enforce collection thereof, or to have such balance included in the judgment as part of the costs of the action.

The plaintiff having recovered, the amount should properly go into the judgment; and an order should now be granted directing the clerk to correct the entry of judgment by including such balance.

It was stated on the argument of the motion, that this was a case of great hardship to the defendant, that the costs in the action were large compared with the amount recovered for damages; which amount was, I believe, less than one hundred dollars. But it must be remembered, that the right to costs here was declared by the order postponing the trial. The granting or withholding them is not now matter of discretion. All that remains now to the court is, to settle the disputed items. When the amount is determined, the right of the party to them is absolute, as much so as is his right to the damages awarded him by the verdict of the jury.

Order granted.

Boynton agt. Boynton.

COURT OF APPEALS.

SILAS BOYNTON, respondent, agt. JOHN BOYNTON, appellant.

In an action of *slander*, the plaintiff, as a witness on his own behalf, stated, on cross-examination, that he had had litigation with the defendant. He was then asked how many suits he had had with him, and for what causes of action?

Held, that the court below properly excluded so much of the inquiry as related to the causes of action. It was in no way material or pertinent to the issue. Its materiality consisted solely in its bearing upon the credit due to the plaintiff as a witness, and was therefore collateral in its nature. The end of such an inquiry would result in an unlimited examination of the previous litigation, and in attempts to indicate the different positions occupied by the parties engaged in it.

To the question, whether the plaintiff had not previously sued the defendant for slander and recovered only \$10:

Held, that this was included in that portion of the previous question which the court rejected as improper. That the remarks on that exception was equally applicable to the exception taken to the exclusion of this inquiry.

Where on the trial there is a variance between the evidence and the complaint, which the court is authorized to disregard, it will be disregarded unless the defendant proves that he has been misled to his prejudice.

June Term, 1869.

APPEAL from a judgment at general term.

T. C. CRONIN and E. D. GILBERT, for appellant.

BURDICK & BETTS, for respondent.

DANIELS, J.—The plaintiff was sworn and examined as a witness on his own behalf upon the trial of the action, and testified that the defendant had a conversation with him in the month of April, 1860, in which he stated to him that he had not a friend in the place, and that he the defendant would do all he could to injure him; upon his cross-examination, the plaintiff stated he had had litigation with the defendant. He was then asked how many suits he had had with him,

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and for what causes of action. The court excluded so much of the inquiry as related to the causes of action, and the defendant excepted to the ruling.

The evidence proposed to be given by the answer to so much of the question as was excluded was in no way material or pertinent to the issue found between the parties and which formed the subject of the trial. Its materiality consisted solely in its bearing upon the credit due to the plaintiff as a witness, and was, therefore, collateral in its nature. Inquiries of this character must necessarily be limited and restricted in their nature, otherwise the trial of issues upon pleadings would be often so far extended by them as to obscure the real points involved in the controversy, and obscure the minds of the jurors called upon to decide them. The object of such inquiries is to show, that the witness may be giving his testimony under some feeling or impulse inconsistent with an impartial disclosure of the truth. It is not material to inquire after the particular process or the detail of circumstances by means of which that feeling may have been produced. For the fact itself, is all that the case can require to be proved, and all that the law will permit to be shown. The discovery of the motive under which the witness may, at the time, be giving his evidence is the end and object to be attained. And that can always be accomplished by the direct inquiry concerning its existence or concerning the facts themselves, ordinarily indicating the existence of improper motives. It is sufficient to show that difficulty, affecting his feelings and likely to influence his evidence, exists between the witness and the party it may be given against, and that can always be done without pursuing a detailed inquiry into the circumstances attending its development. "Personal controversy may always be shown though the particulars, shall not be inquired into" (2 *Cowen & Hill's notes*, 3d ed., 717; *Starks agt. People*, 5 *Denio.*, 106, 108). The inquiry after the causes of action involved in the litigation was properly excluded. It was sufficient, for the purposes of the

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defendant, that the parties had previously been engaged in litigation. An inquiry into its causes was not only unnecessary, but upon the trial of the issue before the court, it would have proved altogether impracticable. For, in the end, it must have resulted in an unlimited examination of the previous litigation, and in attempts to vindicate the different positions occupied by the parties engaged in it.

The next exception was taken to the exclusion of the question whether the plaintiff had not previously sued the defendant for slander and recovered only ten dollars. This was included in that portion of the previous question, which the court rejected as improper, and what has been said in considering the exception to that ruling, is equally applicable to the disposition of the exception taken to the exclusion of this evidence. The slanderous words complained of, imputed the crime of larceny to the plaintiff, in stealing corn. When the defendant was examined as a witness in his own behalf, he was asked why he moved the corn. The plaintiff objected to this question, and the court sustained the objection. An exception was taken to the ruling, and that is now relied upon as error, when the question was asked, there was no view of the controversy presented by the evidence given, rendering it in any possible sense material to the issue. The motive that induced the defendant to move the corn, had nothing whatever to do with the controversy, and the objection to the question was, therefore, properly sustained. After the defendant had entered upon his defense, a motion was made by his counsel, that the evidence of all the plaintiff's witnesses who had testified to the speaking of slanderous words should be stricken out, on the ground that the evidence given by them was not within the issue, or according to the allegations in the complaint, and on the ground of a variance from the allegations. The court struck out the evidence of three of the witnesses, and denied the motion as to the rest, and the defendant excepted. The words alleged in the complaint charged the plaintiff with stealing corn, and the words

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proved by the witnesses were, in substance, the same as those alleged. There was no such variance between the words alleged and proved as could have misled the defendant to his prejudice. The motion was properly denied, and the exception deserves no further consideration. Evidence was given of slanderous words spoken by the defendant concerning the plaintiff, in the state of Vermont, and this the defendant moved the court to strike out, and excepted to the refusal of the court to so do. There was a variance between this evidence and the complaint, because it was not alleged that the defendant had slandered the plaintiff in the state of Vermont. But the variance was one which the court was authorized to disregard, unless the defendant proved that he had been misled by it to his prejudice in the manner provided by the Code, section 169. No such proof was offered, and consequently, no legal error was committed by disregarding the variance. These words, though uttered in a neighboring state were the proper subject of an action in this state. The cause of action created by them was transitory in its nature, under the rule established before the Code, because the transaction itself was one which might have occurred at any place. It was not a wrong of a local character, and for that reason constituted the proper subject of an action in this state. The rule of practice previously existing in this respect, has not been abrogated by anything contained in the Code of Procedure. That an action may be maintained in the courts of this state for such a cause is too well settled to be now made the subject of a legal controversy (*Rafael agt. Vaelst*, 2 *Black*, 1058; *Smith agt. Bull*, 17 *Wend.*, 323; *Lister agt. Wright*, 2 *Hill*, 320; *Chapman agt. Wilber*, 6 *Hill*, 475; *McIvor agt. McCabe*, 26 *How.*, 257; *Hull agt. Vreeland*, 42 *Barb.*, 543). The defendant also moved to strike out the evidence of the witness McFarland, on the ground that the communication was privileged under the rule depending upon the relation of counsel and client. No such relation was shown to have existed between the defendant and this

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witness as would bring the case within the operation and protection of that rule (*Sibley* agt. *Waffle*, 16 N. Y., 180, 183), and if such a relation had existed the words which the witness testified that the defendant uttered would not have been protected by it, because they did not appear to have been spoken for the purpose of procuring his legal advice upon them, or upon any subject in any manner connected with them. As no further reasons have been presented for the reversal of the judgment recovered in this case, it should be affirmed.

One of the judges dissented.

[The People agt. The Police Comm'rs of Troy.]

SUPREME COURT.

THE PEOPLE, *ex rel.*, JOHN J. GRACE agt. THE BOARD OF
POLICE COMMISSIONERS OF THE CITY OF TROY.

The board of police commissioners of the city of Troy, have the power, under the act by which they were organized, to remove a member of the police force by reason of his being *over age*. And it makes no difference whether the member removed, was appointed *before* the commissioners had by their rules and regulations, fixed the ages of its members, or not.

As the commissioners have a right to determine whether a member is disqualified from acting under the rules and regulations which they have adopted, their action in removal cannot be disturbed unless they have transcended their powers. And as they clearly have jurisdiction in such case, even if they act unlawfully, the remedy is not by *mandamus*, but by a *common law certiorari*.

Albany General Term, March, 1872.

Before MILLER, P. J., POTTER and BALCOM, JJ.

APPEAL by the relator from an order made at special term, denying an application for a peremptory *mandamus* against the board of police commissioners of the city of Troy, to require said board forthwith to permit and suffer the relator to discharge his duties as captain of the police force of said city, and to execute and deliver to him drafts upon the chamberlain for the payment of the relator's salary theretofore earned.

On the 19th day of June, 1871, he was served with a notice to appear before the commissioners on the 31st of that month, to answer to charges preferred against him for disqualification by reason of being *over age*. The relator appeared, and such proceedings were had, that on the 1st of July, 1871, the board removed him on the ground of his being over forty years of age.

The board consists of three commissioners of which the

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mayor is one and the chairman of the board, the other two are elected.

The other facts, so far as material, are sufficiently referred to in the opinion.

M. I. TOWNSEND, *for relator.*

R. A. PARMENTER, *for respondent.*

By the court, MILLER, P. J.—I think that the commissioners had power to revoke the relator's appointment. The rules and regulations of the commissioners prescribe certain qualifications for persons appointed, and among others, that such persons shall be not less than twenty-one, nor over forty years of age, when, therefore, a person appointed arrives at the age of forty years, he becomes disqualified, and the right to declare that he is such is incident to the general powers of the commissioners. If it were otherwise then the rule would be of no avail after an appointment had once been made.

The question whether the relator had arrived at the age which disqualified him, was then a fair subject of inquiry and examination, and after notice to the relator, the commissioners were authorized to proceed and determine how the fact was.

Nor is it, I think, any answer to this view of the subject, to say, that the relator was appointed before the board had adopted any rules as to qualifications; for if such was the fact, he would, nevertheless be bound by any subsequent rules which the commissioners had authority to adopt. He had no reserved rights which gave him power to retain the office, for an unlimited period of time beyond that prescribed for other members of the force, and was subject also with them, to such general regulations as might be adopted. Were it otherwise, he might remain to an extreme old age, without any power of removal by the board of commissioners. Section 11 of the act provides, that "all officers and mem-

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bers of the police department subject to removal for cause hereinafter specified, shall hold their offices during good behavior, or as each shall well and faithfully observe and execute all the rules and regulations of said board, &c. (*S. L. of 1870, p. 1225*). This provision does not confer any exemption from a compliance with the rules and regulations of the board lawfully established, and although no removal could be made, except for the causes specified, yet, when the officer holds in violation of any rule, I think, the appointment can be revoked. By section 22 of the act, the commissioners are empowered "to enact and from time to time to modify and repeal, by-laws, ordinances, rules and regulations of general description," &c. "Wherein shall be specified the modes of appointment to, and removal from office of all members of said police force, and the manner of discipline of said police," &c. Any new rule would apply to those in office as well as such as might afterwards be appointed, and under this provision, the commissioners were authorized as a matter of discipline to fix and prescribe the age of its officers.

As the commissioners had a right to determine whether the relator was disqualified from acting under the rules and regulations which had been adopted, their action cannot be disturbed, unless they have transcended their powers.

And as they clearly had jurisdiction even if they acted unlawfully, the remedy was not by *mandamus*, but by a common law *certiorari*. This would prevent the subject of their action for review, and in such a proceeding, the court may go beyond the inquiry, whether the inferior tribunal had jurisdiction, and examine the case upon the whole evidence, to ascertain whether any error had been committed in the proceedings before the inferior tribunal (*The People ex rel., Cook agt. The Board of Police, 39 N. Y., 506*). This and other recent cases enlarges the office of a common law *certiorari*.

The cases relied upon to establish that a *mandamns* was

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the proper remedy, all present the question of jurisdiction, and do not involve a trial and determination where there was no question as to the jurisdiction (19 *N. Y.*, 188; 35 *Barb.*, 535; 27 *Barb.*, 487; 30 *How.*, 78).

In *The People agt. The Board of Police*, (26 *Barb.*, 481), it was held distinctly that a *certiorari* to review the proceedings of the board of police, in removing a policeman, was the appropriate remedy for the party aggrieved (See also 27 *N. Y.*, 378; 33 *N. Y.*, 382). The relator's remedy was, therefore, by *certiorari* and not by *mandamus*.

The special term was right in refusing a *mandamus*, and the order must be affirmed.

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SUPERIOR COURT.

HIRAM A. CRANE, plaintiff and respondent, agt. **HERMAN KNUBEL**, defendant and appellant.

A condition precedent must be strictly performed, and if a person by contract, engages to perform an act, performance is not excused by inevitable accident.

So where the time for the payment of money is to happen after the performance of that which is the consideration, no right of action accrues for the money until the consideration is performed.

Substantial performance is not enough where the person, for whom the work was done, has neither voluntarily accepted it, nor waived a faithful performance of the contract.

A party may retain without compensation, the benefits of a partial performance, where from the nature of the contract he must receive such benefits in advance of a full performance, and by its terms or just construction he is under no obligation to pay until the performance is complete.

In relation to a *builder's contract*, where the builder has in part performed his contract and furnished materials which have been placed in the building, such materials become annexed to the soil, and thereby the property of the owner of the soil. And the law does not adjudge that a mere silent occupation of the building thereafter by the owner amounts to a waiver of the contract, nor does it deny to him the right so to occupy and still insist upon the contract.

In this case, which arose under a builder's contract made in the usual manner by agreement to pay, by the owner to the contractor, specific separate payments as the work progressed and was completed as specified in the contract:

Held, on a call upon the owner for the fifth payment under the contract, that the evidence fell far short of proving that the defendant (owner) had *accepted* the work actually done as a full performance under the contract, which was required as a condition precedent to such payment, or that the defendant had *waived* a strict performance of the contract.

General Term, April, 1872.

Before BARBOUR, Ch. J., FREEDMAN and SEDGWICK, JJ.

APPEAL from judgment entered upon the report of a referee.

The action was brought to recover \$821 91, the amount of an order drawn by John G. Hoffman, in favor of the plaintiff, and accepted by the defendant, and payable by its terms

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out of the fifth payment to which John G. Hoffman might become entitled under a certain builder's contract made with the defendant.

The answer alleged that said John G. Hoffman abandoned the contract before the fifth payment became due.

The issues were referred, by consent of parties, to a referee to hear and determine the same, and his report is as follows :

First. That on or about the day of October, 1867, the defendant and one J. G. Hoffman made and entered into a certain contract in writing, wherein and whereby the said Hoffman agreed to well and sufficiently erect and finish all the carpenter work in two certain new four story and basement brick dwelling houses, situated on the lot known as the southwest corner of Seventh Avenue and Fifty-ninth street, in the city of New York, agreeable to the plans and specifications made by A. Pfeund, architect, and for which, by the terms of said contract, the defendant agreed to pay him, the said Hoffman, the sum of six thousand dollars in manner following :

1st. When the third tier of beams are leveled up and bridged, the sum of \$500.

2d. When the roofs are tinned and sky lights on, \$1,000.

3d. When the floors are laid, partitions all set, furring all done, the sum of \$1,000.

4th. When stairs are up, sash all in, \$1,000.

5th. When the trimmings all done, doors all hung, \$1,000.

6th. When the work is completed, finished and done in conformity with the plans and specifications, the sum of \$1,500.

Second. That the said Hoffman duly entered upon the said contract, and that the plaintiff furnished lumber to the said Hoffman, to aid him in the performance thereof, to the value and amount of about the sum of one thousand five hundred and eighty dollars (\$1,580) none of which has been paid, but is still due and owing to the plaintiff from the said Hoffman.

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Third. That while performing the work under said contract, the said Hoffman, in payment of certain lumber which he wished to purchase of the said plaintiff to use upon said work, made and gave to the said plaintiff a certain instrument in writing in the words following, to wit: "New York, March 5th, 1868, Mr. Herman Knubel, please pay to H. A. Crane, or order, eight hundred and twenty-one 91-100 dollars (\$821 91-100), and deduct the same from the fifth payment or payments due when trimmings are all on and doors all hung, and much oblige, yours respectfully, J. G. HOFFMAN, (\$821 91-100)," which said instrument was duly accepted by the said defendant in writing across the face thereof in the following words, "Accepted; payable when payment is due, H. KNUBEL."

Fourth. That after the said instrument had been so accepted by the said defendant, the said Hoffman delivered the said instrument so accepted to the plaintiff in this action, and the said plaintiff on the strength and faith thereof, furnished lumber to the said Hoffman to the full and exact amount and value of \$821 91.

Fifth. That the said lumber so furnished was used by the said Hoffman on the said buildings of the said defendant, and has never been paid for except by said draft.

Sixth. That said Hoffman did not complete or finish his said contract, but abandoned the same before the work was completed.

Seventh. That at the time the said Hoffman abandoned the said contract, he had completed the work necessary thereunder to entitle him to the fifth payment, except in some slight particulars.

Eighth. That the said Hoffman, before abandoning the said contract, substantially completed the work necessary to be done to entitle him to the fifth payment, and was substantially entitled to said payment.

Ninth. That the difference between the amount of said payment (\$1,000) and the amount of the instrument in suit

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(\$821 91-100) would more than pay for the work necessary to be done to complete said payment.

Tenth. That after the abandonment of the said contract, and in the month of April, 1868, the plaintiff caused said instrument to be presented to the defendant for payment, who waived the strict performance of the contract by Hoffman, and promised and agreed to pay the amount called for by said instrument to the plaintiff.

Eleventh. That I have calculated the interest on said instrument from the 1st day of May, 1868, to the 28th day of January, 1871 (the date hereof), and find the same to be one hundred and fifty-six 81-100 dollars (\$156 81-100), which added to the amount of said instrument makes the sum of nine hundred and seventy-eight 72-100 dollars (\$978 72).

Upon the above found matters of fact, I find as matters of law :

That plaintiff is entitled to judgment against defendant for the sum of nine hundred and seventy-eight 72-100 dollars with interest thereon from the date hereof, besides the costs and disbursements of the action, and I do order and direct judgment to be entered accordingly.

The defendant excepted to the third, fourth, seventh, eighth, ninth and tenth findings of fact and the conclusions of law of the referee.

Judgment was entered upon the report and defendant appealed.

JAMES M. SMITH, *for defendant and appellant*
DAVID MCADAM, *for plaintiff and respondent.*

By the court, FREEDMAN, J.—It was conceded by both parties, on the argument, that if the contract between Hoffman, the drawer, and the defendant, the drawee and acceptor, has been so far performed as to entitle Hoffman, as contractor, to the fifth payment, plaintiff, as payee named in the order, has an undoubted right to recover; because such order and

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its acceptance operated as an assignment by Hoffman to the plaintiff of the fund in defendant's hands. The main question, therefore, is whether the said fifth payment has been earned by the contractor according to the terms of the contract.

The principle of the common law, which always permitted men to manage their own affairs and to make their own contracts, provided they involved nothing immoral or illegal, which is fully applicable here, also requires that the understanding of the parties is to be gathered from the terms of the contract, and that their rights are to be determined by the language of the contract. Though the terms are hard, parties will be held concluded by their contract (*Sherman agt. Mayor, &c., of New York*, 1 N. Y., 316; *Pike agt. Butler*, 4 N. Y., 362).

A condition precedent must be strictly performed, and if a person, by contract, engages to perform an act, performance is not excused by inevitable accident (*Oakley agt. Morton*, 11 N. Y., 25; *Norton agt. Woodruff*, 2 N. Y., 153).

So, when the time for the payment of money is to happen after the performance of that which is the consideration, no right of action accrues for the money until the consideration is performed; for a party not fulfilling his part of the contract cannot insist that it shall be performed by the other party (*Grant agt. Johnson*, 5 N. Y., 247; *Pike agt. Butler*, 4 N. Y., 362).

In such case, full performance is a condition precedent to the right of payment upon the contract. Substantial performance is not enough when the person, for whom the work was done, has neither voluntarily accepted it, nor waived a faithful performance of the contract (*Pullman agt. Corning*, 9 N. Y., 93).

This doctrine was reaffirmed in *Smith agt. Brady*, (17 N. Y., 187), where it was held by COMSTOCK, J., with the concurrence of all the judges, that the rule is well settled with us, that a party may retain without compensation the benefits of a partial performance, where, from the nature of the con-

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tract he must receive such benefits in advance of a full performance, and by its terms or just construction he is under no obligation to pay until the performance is complete.

The last named case has been followed as an unquestionable authoritative exposition of the law of this state upon the doctrine referred to, in *Cunningham agt. Jones*, (20 N. Y., 486); *Bonesteel agt. The Mayor, &c.*, (22 N. Y., 162); *Catlin agt. Tobias*, (26 N. Y., 217); *Walker agt. Millard*, (29 N. Y., 375); *Husted agt. Craig*, (36 N. Y., 223); *Harris agt. Rathbun*, (2 Keyes, 319); *Jenkins agt. Wheeler*, (3 Keyes, 654).

In view of this repeated indorsement it will not be deemed out of place to notice more fully the remarks of COMSTOCK, J., in *Smith agt. Brady*, (17 N. Y., 187), as to the rights of the parties to a building contract, he says:

"The owner of the soil is always in possession. The builder has a right to enter only for the special purpose of performing the contract. Each material as it is placed in the work becomes annexed to the soil, and thereby the property of the owner. The builder would have no right to remove the brick, or stone, or lumber after annexation, even if the employer should unjustifiably refuse to allow him to proceed with the work. The owner, from the nature and necessity of the case takes the benefit of part performance, and therefore, by merely so doing, does not necessarily waive anything contained in the contract. To impute to him a voluntary waiver of conditions precedent from the mere use and occupation of the building erected, unattended by other circumstances, is unreasonable and illogical, because he is not in a situation to elect whether he will or will not accept the benefit of an imperfect performance. To be enabled to stand upon the contract, he cannot reasonably be required to tear down and destroy the edifice, if he prefers it to remain. As the erection is his by annexation to the soil, he may suffer it to stand, and there is no rule of law against his using it without prejudice to his rights.

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"* * * * * The law does not adjudge that a mere silent occupation of the building by the owner amounts to a waiver, nor does it deny to him the right so to occupy and still insist upon the contract. The question of waiver of the condition precedent, will always be one of intention, to be arrived at from all the circumstances, including the occupancy. To conclude, there is, in a just view of the question, no hardship in requiring builders, like all other men, to perform their contracts in order to entitle themselves to payment, where the employer has agreed to pay only on that condition. It is true, that such contract embraces a variety of particulars, and that slight omissions and inadvertencies may sometimes very innocently occur. These should be indulgently regarded, and they will be so regarded, by courts and juries. But there can be no injustice in imputing to the contractor a knowledge of what his contract requires, nor in holding him to a substantial performance.

"* * * If he fails to perform, when the requirement is plain, and when he can perform, if he will, he has no right to call upon the courts to make a new contract for him; nor ought he to complain if the law leaves him without remedy."

According to the well settled law of this state, therefore, the fifth payment did not become due and payable under the contract in the case at bar, until the trimmings had been all done and the doors all hung in the manner required by the specification, which form part of the contract. The doing of all the trimmings and hanging of all the doors were made, by the voluntary act of the contracting parties, a condition precedent to the payment of the money. The consideration for the payment is entire and undivisible so that the money payable as such fifth installment is neither apportioned by the contract, nor capable of being apportioned by a court or jury. Plaintiff rested without proving performance of the work which would have entitled Hoffman to such fifth payment. Consequently, plaintiff's order was not shown to

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have become due, and the referee erred in denying defendant's motion for a dismissal of the complaint, unless the evidence clearly showed, that the defendant had accepted the work actually done as a full performance, or had waived a strict performance of the contract, a question, which I shall notice more fully hereafter.

Again, it appears without contradiction from the evidence of the entire case, that Hoffman, the contractor, in the early part of April, 1868, ceased work, before the fifth payment became due; that on the 10th of that month, the defendant by written notice insisted upon performance of the balance of the work then unfinished; that Hoffman did not return to finish the work, and that the defendant was compelled to finish it himself; that at the time of Hoffman's abandonment of the contract there were no doors hung on the basement and first or parlor floors of either house, and that a considerable part of the trimmings remained undone. It is, therefore, not a case of imperfect performance, or of a defect in the manner of performance, but a clear case of non-performance of the contract, and consequently, the referee erred in finding, as matter of fact, a substantial performance, which entitled Hoffman to the payment of the fifth installment and, as matter of law, that plaintiff is entitled to judgment against the defendant, and the judgment must be reversed, unless the further finding, that after the abandonment of the contract, the plaintiff caused the order to be presented to the defendant for payment, who waived the strict performance of the contract by Hoffman, and promised and agreed to pay the amount called for by said instrument, to the plaintiff, is not only supported by the evidence, but sufficient in law, when considered with the other real and undisputed facts of the case, to sustain it.

The evidence upon the question of waiver consists of,

1. The testimony of Edwin Bradbrook, a witness and employee of the plaintiff, who testified, that on or about the 10th day of April, 1868, he presented the order or draft to

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the defendant for payment, and that defendant at that time told him that he, defendant, had no money, but that he expected some on the 1st or 2d of May, and that he would call down and see the plaintiff and settle with him; that during said conversation defendant did not say anything about Mr. Hoffman not progressing with the work.

2. The testimony of Leroy Clark, a witness called on behalf of the plaintiff, who testified as follows: I remember calling on the defendant about the 15th day of April, 1868; I presented the "Exhibit No. 1" to him; it was the same as it now is, with the exception of the referee's mark; I asked him if he could pay us the amount of it, or words to that effect; he said he could not pay it then—the work was not done, the doors were not hung, that Mr. Hoffman had disappointed him; he said he could not pay it then as he had not the money; he would pay it the next week; he would give Mr. Crane a check for it; he said the parlor doors were not hung, I went into the building at the time and saw the parlor doors standing in the room; I went through the houses; he spoke of nothing but the doors being unhung and incomplete; and

3. The further testimony of the witness Edwin Bradbrook, to the effect, that he saw the defendant again on the 9th of May following, and that defendant at that interview stated that the contract was not yet fulfilled, that Hoffman had abandoned his contract, and had put him, the defendant, to extra expenses.

Assuming this testimony to be true, it falls very much short of establishing a waiver, within the rule laid down in *Smith agt. Brady* (17 N. Y., 189; see also *Catlin agt. Tobias*, 26 N. Y., 217). According to it, the first interview took place on or about the date of defendant's written notice to Hoffman, wherein defendant insisted upon full performance, at a time, therefore, when defendant had a right to expect that Hoffman would come and complete his contract, and defendant's promise then made must be deemed to have

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been made with reference to such expectation. The conversation with Leroy Clark, took place about five days later. There is no evidence that by that time defendant had become aware that Hoffman had really abandoned his contract, and his naked promise, made under such circumstances, to send a check in the course of a week, coupled with the remark, that the doors were not yet hung, cannot be twisted into a waiver of performance by Hoffman.

At the second interview which occurred between the witness Bradbrook and defendant, on the 9th of May following, the defendant distinctly fell back upon his legal rights under the contract.

This testimony is not only insufficient in itself to establish inferentially a case of waiver, but it is flatly contradicted by that of the defendant, who positively denied having made any such promise as testified to by the witnesses named, and in terms equally positive, testified that he told both said witnesses that he would not pay, because the work had not been finished.

The question of waiver in this case not being a question of law, but of fact and intention between the contracting parties, namely, Hoffman and defendant, to be determined upon all the circumstances of the case; and the evidence being wholly insufficient to establish such fact, the referee clearly erred to find that such waiver had taken place.

For the foregoing reasons, the judgment must be reversed, the order of reference vacated and a new trial granted, with costs to the appellant to abide the event.

BARBOUR, *Ch. J.*, and SEDGWICK, *J.*, concurred.

Pendril agt. Second Ave. R.R. Co.

N. Y. SUPERIOR COURT.

JAMES PENDRIL, by his guardian, &c., appellant, agt. THE
SECOND AVENUE RAILROAD COMPANY, respondent.

Two boys, one twelve and the other five years of age—the eldest leading the youngest by the hand, undertook to cross the Second Avenue, from west to east, near 28th Street in the city of New York, about noon in the day; a Second Avenue street-car was approaching them, and about ninety or a hundred feet south of them, upon an up grade, when they reached the westerly rail of the railroad; and after the eldest boy had cleared the easterly track and the horses, the off horse struck the youngest boy—who was a little behind, knocked him down and the forward wheel of the car ran over him and severed his right arm near the shoulder.

On the trial the testimony showed that the car in which was but a few passengers, was driven with great rapidity—so much so that the witness would be unable to get on or off it; that the driver stood on the front platform leaning his shoulders against the car, with loose reins which he was swinging up and down upon the horses to urge them to greater speed; that with proper driving and care the car could have been stopped within sixteen to twenty-two feet, and the collision avoided:

Held, that the judgment dismissing the complaint, and the order denying a new trial upon the judges' minutes, appealed from, be set aside, and a new trial ordered.

Argued General Term, January, 1872.

Decided May 30, 1872.

Before CURTIS, P. J., McCUNN and SEDGWICK, JJ.

THIS action comes before the court on an appeal by the plaintiff, from a judgment entered upon an order dismissing the complaint, and also from an order denying plaintiff's motion for a new trial. The plaintiff sues to recover damages for alleged negligence on the part of the defendants in driving one of their cars over him, and cutting off his right arm. The defendants denying negligence on their part, and set up that the injuries were occasioned by the negligence of the plaintiff. It appeared on the trial, that the plaintiff, a boy

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of five years of age, with a large boy about twelve, who held him by the hand, attempted to cross the Second Avenue, at the upper 28th street crossing. The boys passed over defendants' westerly track, and had passed so far upon their easterly track, that the large boy was clear of the horses of defendants' car, which was being driven up the avenue, but the small boy, the plaintiff, was thrown down by the off horse, and run over by the car-wheel, and was lying when the car was stopped, between the wheel on the easterly rail of the track, with his arm so nearly severed at the shoulder, that it had to be amputated.

The evidence shows, that the boys were on the westerly track and crossing over towards the easterly track upon the crossing when the car was about ninety or a hundred feet from them. That the car was driven "very rapidly," the horses were on a "fast gait." The witness was not positive whether they were running or trotting. It appears that the rate of speed was such, that it was unsafe for the witness to get on or off at the time. The grade was ascending up which the car was coming, with very few passengers in it. The driver was on the front platform, standing with his back against the front of the car or window. The reins were slack, and he held them in both hands, shaking them.

It was about noon, a clear day, and the plaintiff conspicuously dressed. The pole of the car was ten feet in length, and the car twenty-two feet, making thirty-two feet in length, and from the testimony, considering the grade and the load, could have been stopped in from sixteen to twenty-two feet.

ALBERT MATTHEWS, *for appellant.*

First. Although there has been some apparent wavering among our different courts upon the rule of law applicable to the question of "negligence" in this class of cases, it may now be deemed finally settled, by the court of appeals: that

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where the conclusion of negligence on the part of either plaintiff or defendant, is a fact to be drawn from a variety of facts and circumstances, neither of which is in itself clear and decisive, it is always "a question of fact exclusively within the province of the jury;" and that it is a matter of right to have the issue of "negligence" submitted to the jury, when it depends on "inferences to be derived from a variety of circumstances in regard to which there is room for a fair difference of opinion between intelligent and upright men" (*Ireland agt. O. H. & S. Plank R. Co.*, 13 N. Y., 533; *McGrath agt. Hudson R. R.R. Co.*, 32 Barb., 147; *Keller agt. N. Y. Central R.R. Co.*, 24 How., 177; *Creed agt. Hartmann*, 29 N. Y., 592; *Mulhado agt. Brooklyn City R.R. Co.*, 30 N. Y., 373; *Ernst agt. Hudson R. R.R. Co.*, 35 N. Y., 38 to 40, and 46 & 47; *Maloy agt. N. Y. Central R.R. Co.*, 8 Barb., 184)

1st. "Negligence" in general is a question ordinarily to be submitted to the jury as matter of fact (*see points of counsel*, 3 Robts., 27; *Phillips agt. Renns. and Saratoga R.R. Co.*, 57 Barb., 644).

Second. The defendants were clearly shown to be in the wrong, by reason of rapid and reckless driving. Now, whether the plaintiff was also in the wrong, by attempting to cross the track as he did, and miscalculated the time required for the car to reach him, was a question of fact for the jury (*Hogan agt. Eighth Avenue R.R. Co.*, 15 N. Y., 383; *Ments agt. Second Av. R.R. Co.*, 2 Robt., 356; *Aff'd. Ct. of Appeals*, 1869, *Alb. Law Jour.*, Feb. 5th, 1870.)

1st. On a motion for nonsuit, all facts and circumstances and inferences of fact, are to be taken most strongly in favor of the plaintiff (*Ernst agt. Hudson R. R.R. Co.*, 35 N. Y., 25).

2d. From the point where the boy stood, near the westerly or down track, when he started to cross the tracks, a line from his eye to the car, intersecting with the line of the easterly or up track of the railway, formed an angle so acute, at the place where the car then was (while the boy was

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thus attempting to cross the tracks), that a highly experienced adult might well have miscalculated, both as to the distance and as to the excessive speed of the horses approaching him.

3d. Although, by unusual precaution and watchfulness on the part of the plaintiff, the consequences of defendants' wrong might have been avoided, yet if the plaintiff was guilty of no culpable negligence, the mere fact that he might have been "more vigilant," will not exculpate the defendants (*Fero agt. Buff. and S. Line R.R. Co.*, 22 N. Y., 215; *Ernst agt. Hudson R. R. Co.*, 35 N. Y., 26).

4th. The plaintiff had as good right to use the highway as the defendants, and he was in a place of safety at the time of the injury, except as that place was made dangerous by the unlawful act of the defendants in running their cars at an unlawful and dangerous rate of speed (*Ernst agt. Hudson R. R. Co.*, 35 N. Y., 26; *Baxter agt. Second Avenue R.R. Co.*, *Rob.*, 516).

5th. The defendants being themselves wrongdoers, the plaintiff was under no obligation to them to be cautious or circumspect. He was only disabled from holding them responsible in case he was deficient in ordinary prudence (*Tonawanda R.R. Co. agt. Munger*, 5 Denio, 266).

6th. The plaintiff is not barred from a recovery even if he were himself guilty of "slight neglect" or absence of extreme caution. He was only called on to exercise ordinary care and caution under the circumstances (*McGrath agt. Hudson R. R. Co.*, 32 Barb., 144).

Third. The circumstances that the plaintiff was a young child, did not necessitate greater diligence or caution on his part than if he had been an adult. But this very circumstance of his extreme youth, coupled with the fact that the defendants were driving a dangerous and powerful machine through a public highway, obligated them to use extra care and caution to avoid inflicting injury upon persons crossing that public highway in the ordinary course of their business (*Sheridan agt. Brooklyn & Newtown R.R. Co.*, 36 N. Y. 42;

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Cook agt. *N. Y. Cent. R.R. Co.*, 3 *Keyes*, 479; *Lynch* agt. *Smith*, 104 *Mass. Rep.*, 52).

1st. Indeed what might be deemed "negligence," in a person of mature years, might not be regarded as "negligence" in so young a boy (*O'Mara* agt. *Hudson R. R.R. Co.*, 38 *N. Y.*, 445).

2d. There is no legal principle which imputes to an infant "negligence" of his parents; when the infant himself is free from "negligence," and if he were an adult he would not be affected by such "negligence" (*Lannen* agt. *Albany Gas Light Co.*, 46 *Barb.*, 270-1).

3d. Indeed, it is now held in our highest court, that an infant can maintain an action for an injury resulting from the "negligence" of another, save only when he has himself omitted such care, as might be reasonably expected from one of his capacity (*Mangum* agt. *Brooklyn C. R.R. Co.*, 38 *N. Y.*, 455).

4th. This plaintiff was under sufficient protection and care to save him from voluntary exposure to damage, if he had been disposed to precipitate himself into it. In point of fact, he acted with all the ordinary care of a sagacious adult.

5th. There was, however, no obligation on the part of the parents of the plaintiff to provide a protector to prevent injury to him from the defendants' wrongful acts (*Sheridan* agt. *Brooklyn & N. R.R. Co.*, 36 *N. Y.*, 43).

Fourth. All the circumstances of this case should have been submitted to the jury, so that they might have determined how far such circumstances tended to establish the assumed fact of "negligence" on the part of the plaintiff (*Ginnon* agt. *Har. R.R. Co.*, 3 *Robts.*, 30; *Baxter* agt. *2d Avenue R.R. Co.*, 3 *Robts.*, 515).

1st. The speed at which the car was running, the facility with which the defendants' driver might by ordinary care have obviated the danger of injury to the plaintiff by reason of the conspicuous dress of the latter, the circumstance that

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the boys were crossing in front of him, the brightness of the light of the day, were all circumstances tending to show gross negligence on the part of the defendant.

2d. The distance of the car from the boys when they had reached the middle of the street, the probability that the defendants' driver would see the two boys and refrain from attempting to kill them, the freedom of the street from any other interrupting obstacles, the age and activity of the two boys, and the escape of the one, were also all circumstances bearing upon the questions of fact, (whether plaintiff himself was exercising "that degree of care which might be expected" from a person in plaintiff's situation, and whether there was an absence of culpable negligence on his part), which should have been submitted to the jury.

3d. If it be claimed that any inference of "negligence" is to be drawn from the fact of allowing the plaintiff to be in the street on this bright clear day, at noon, with no other companion than the elder boy, then this, too, was purely a question of fact for the jury to determine (*Drew agt. Sixth Avenue R.R. Co.*, 26 N. Y., 52; *Jetter agt. N. Y. & Harlem R.R. Co.*, 2 *Keyes*, 159; *Mangam agt. Brooklyn R.R. Co.*, 38 N. Y., 455).

Fifth. The nonsuit should be set aside, and a new trial ordered.

JOHN SLOSSON, *for respondent.*

First. The nonsuit was properly granted, as there was no evidence to sustain a verdict against the defendants.

There was no evidence of any negligence on the part of the defendants; on the contrary, the evidence tends to show that the driver of the car used great diligence to prevent the accident.

The only witness of the particulars of the accident, was William E. Arnold, who, when it occurred, was sitting under a cart on the west side of Second Avenue, opposite the

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second house, below Twenty-eighth street. He was engaged in painting the cart, with his head bent, and his story is extremely vague.

The car was going up the avenue on the easterly track, and, according to the witness, when it was opposite to him he saw the plaintiff, a little boy, holding the hand of a larger boy, crossing the avenue from west to east on the upper crossing of Twenty-eighth street, and they "seemed" to him then to have reached the easterly rail of the westerly track. Whether the boys were running or walking he could not tell. What they did after that he does not tell, except that the plaintiff when struck was "standing." He at this time was looking under the car, and could see the legs of the boy only. What he says about the car is equally vague. He says it was going faster than usual (but that is always the story in horse-railroad accident cases, and means, if anything, that it was going five or six miles an hour); that when opposite to him the driver was "standing very carelessly in front of the car. He had the lines "in both hands shaking them." After the car passed him he, of course, lost sight of the driver, and says, "I do not know how soon he attempted to hold up his horses, nor what position his hands was in with regard to the brake, nor what position he was in with reference to the lines." Again he says, "I do not know what he (the driver) did after he passed me."

The boy was picked up between the wheels—that is, between the front and rear wheels on the easterly rail of the easterly track, the car having come to a stand-still.

This is all the evidence in the case, bearing on the question of the defendants' negligence when the plaintiff rested, and from it, this conclusion inevitably follows:

Assuming that the driver saw the boys, when he was opposite where the witness Arnold was, they were still on the westerly track, in a place of safety.

1st. He had a right to assume that they would not attempt to run in front of his rapidly advancing horses, and to act on

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that presumption (*Newton agt. N. Y. Central R.R. Co.*, 29 N. Y., 333).

When he saw they were actually going to do it, his horses had approached them very nearly, for it is obvious that the distance was very rapidly diminishing every moment. He may have supposed, and probably did, as he had a right to, that after leaving the westerly track, they would stop until the car had passed, but it is perfectly clear that the moment he became convinced that they were about to attempt to cross him in front, he used every exertion to stop the car, for the boy was picked up about half the length of the car, between the fore and hind wheels, a distance of twenty-one feet from the extremity of the pole, and after the car had come to a stand-still; this according to Stephenson, was "good working" of the brakes. And it shows that from the moment the driver saw that the boys were about to perform this hazardous feat, he used every possible exertion to prevent an accident, and so far succeeded that an instant more of time would have saved the boy, for he was evidently knocked down by the easterly horse. At all events, the evidence is, that it was the easterly wheel which passed over him, he had therefore, cleared the horse nearest to him, and was knocked down by the other horse.

It will be observed that, this is not the case of a car running over a person lying before it disabled on the rails, but of a collision with a person in the street, having full power of locomotion, who an instant before was in a place of safety, which the driver had a right to assume he would not quit, and to govern his own conduct accordingly, but which he voluntarily and without necessity did quit, to cross a space of about five feet in front of the driver's horses, when they were so near that the experiment may be said to have been one of life and death.

Under such circumstances, a verdict, finding negligence on the part of these defendants, could never have been sustained.

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Second. The plaintiff's negligence is self-evident. He attempted to run in front of the horses, which when he left the westerly track, were at but a short distance from him, and advancing with rapidity. He left a place of safety when there was no occasion for his doing so; and when he reached the easterly track, the horses must have been almost up to him; but instead of stopping to let them pass, he rushed in front of them, and so near were they to him, when he touched the easterly track, that he was actually knocked down by the further horse, showing beyond peradventure, that he attempted the fearful experiment, when the horses were almost upon him. The plaintiff cannot plead that he did not see the car. There was no obstruction to the vision as Arnold swears. If he did not look, that was of itself such negligence as precludes a recovery, and the law will presume that he did not look, if the evidence does not show, that the vision was obstructed by other objects, so that he could not have seen an approaching car, and there is no such evidence in this case. This rule is settled beyond all dispute in *Wilcox Admx. agt. Rome, &c., R.R. Co.*, (39 N. Y., 358); *Ernst agt. H. R. R.R. Co.*, (39 N. Y., 61), approved in *Havens agt. Erie R.R. Co.*, (41 N. Y., 296), and to same effect, *Harty agt. Central R.R. of N. J.*, (42 N. Y., 468), as well as in other cases.

If he did look and saw the car, which he could not help doing, if he had looked, then his conduct was not only negligent, but madness itself, and deprives plaintiff of all right of action (*Ernst agt. Hudson R. R.R. Co.*, 35 N. Y., 9).

If he had stopped as he should have done, and the driver had a right to assume he would do, before he reached, or even, at the westerly rail of the easterly track, he would have been safe. At that moment the horses were so near him, that he could only clear one of them, yet he made the experiment.

Even if negligence on the part of the driver had been

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proved, that act of plaintiff's under all the decisions precludes a recovery.

The fact, that the plaintiff was a child makes no difference in the application of the rule. This is well settled (See Court of Appeals decision in *Honigsberger agt. Second Ave. R.R. Co.*, 31 How., ; *Burke agt. Broadway & Seventh Ave. R.R. Co.*, 49 Barb., 527).

Third. Under this evidence a nonsuit was inevitable, the motion to set it aside should be denied with costs.

By the court, CURTIS, J.—The appellants claimed upon the argument, that it was a matter of right to have the issue of negligence submitted to the jury, where it depends on "inferences to be derived from a variety of circumstances, in regard to which there is room for a fair difference of opinion between intelligent and upright men." That all the circumstances of this case should have been submitted to the jury, so that they might have determined how far such circumstances tended to establish the assumed fact of negligence on the part of the plaintiff and that plaintiff's extreme youth obligated defendants to use extra care and caution to avoid inflicting injury.

On the part of the respondents it was claimed, that there was no negligence on the part of the defendants, but on the contrary, that the evidence tended to show that the driver of the car used great diligence to prevent the accident, and that the negligence of the plaintiff is self-evident.

The question arises, whether this is a case that should have been left to the jury. It is undoubtedly true, that when the negligence of the plaintiff is clearly shown, there may be occasions, when it becomes the duty of the judge to dismiss the complaint. But it does not appear that this is a case of that character. The evidence shows, that the car was being driven at an unusual and rapid rate of speed, up an ascending grade, that the driver was leaning back on the front platform, shaking his loose reins. It was noon, his

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view was unobstructed, and when he stopped the car, the front wheel had passed over the plaintiff. As the plaintiff approached the track passing over the westerly track first, the car was ninety or one hundred feet off. It could have been stopped in from sixteen to twenty-two feet. A careful driver, with proper control of reins and brakes, could have avoided the collision. With reins held taut, the driver could have sheered the horses off the track and prevented the knocking down, by the off horse, of the plaintiff as he passed over the easterly rail of the track. A proper control and use of the brake could have certainly stopped the car a fraction of a second sooner, which would have prevented the wheel passing over the plaintiff. It looks as if the driver did not get himself in a position to stop the car until the horse was upon the plaintiff, and then it was too late to arrest its motion by some five or six feet, so as to save plaintiff from the wheel. An adult might be deceived in the rate of approach and speed of a street-car driven unusually rapid, and least of all at such a time, should the driver be as the witness testifies, "carelessly in front of the car, the lines in both hands shaking them." Apparently urging his horses to a still higher rate of speed.

His duty was to have the reins and brake in his control, and to drive in a careful and usual manner. It is impossible to conceive that a man, put in so responsible a position by the defendants, would wantonly drive over a child, but it looks very much as though he was driving in an inconsiderate and negligent manner. The negligence, if any, of the plaintiff crossing the avenue, led by the hand of another child of maturer years, under these circumstances is not so apparent as the respondents claim. On the contrary it seems difficult to see wherein it consists. An adult acting with reasonable prudence, might be deceived by unusual and careless driving and run over in consequence of it.

It would be a retrograde movement in civilization, to establish a rule, that those who obtain the privilege of run-

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ning horse-cars on railways through the streets of a crowded city, can run them without some observance of care and protection towards those whom old age, infirmity or tender years, commend to universal consideration and care.

The theory that the cars in such a case would be a longer time in making their trips and that children should be kept in the house, or under the care of some suitable protector when they go in the streets, has no controlling force. The idea of feudality, that the footman must keep out of the way of the horseman, has given place in the most enlightened and civilized cities of the world to a careful and practical consideration for the pedestrian, increasing in proportion to personal incapacity. The concession of privileges to increase the means of communication through the streets of a city, does not, even by implication, waive any privilege of personal safety to the citizen and his household. Their rights and welfare are not relinquished to favor any increase of speed.

The child has its rights. One is to be educated by the state, which provides instruction at certain hours of the day. The streets and avenues traversed by horse-railways are thronged and crossed necessarily by many tens of thousands of children on their way to, or from places of instruction, profiting by this public provision and invitation extended to them. To have an adult custodian with any considerable number of them would be impossible. To keep them home would conflict with the best interests, and the established system of the state, and be a denial of the rights of the child.

Judge MASON, in *Mangam agt. Brooklyn R.R. Co.*, (38 N. Y., 461), defending the rights of children of tender years, says: "They are not beyond the pale of the law when in the streets; common humanity is alive to their protection, and the law both in reason and justice, and out of compassion to their weakness and inability to protect themselves, should throw a broader shield of protection around them, against injuries from the careless conduct of the strong, than it affords to an adult, who is capable of self defense and protection."

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Judge GROVER, in the same case considers "that a somewhat different rule in determining the care to be exercised, is to be applied to infants than is applicable to adults, when the inquiry is, whether their negligence has contributed to an injury received." In the case of *O'Mara agt. The Hudson R.R. Co.*, (38 N. Y., 449), the same views are sustained, and Chief Judge HUNT affirms that the young "cannot be required to exercise as great foresight and vigilance as those of maturer years. This an engineer is bound to know, and if the child is in his view, to act accordingly."

These observations apply with great force to the case under consideration. There is not shown in it that negligence on the part of the plaintiff, that sustains a departure from the general rule, that the question of the contributory negligence of the party injured, should be left with the jury. It may be regarded as now in accordance with the uniform tenor of the recent English cases, and those in our courts, that the general question of negligence of the defendants, and the contributory negligence of the plaintiff, are exclusively within the province of the jury (*Lunt agt. Railway Co.*, 1 *Law Rep.*, Q. B., 277; *Beebe agt. Railway Co.*, 18 *Com. B. N. S.*, 584; *Stupley agt. Railway Co.*, 1 *Law Rep. Ex.*, 21; *Stubley agt. Railway Co.*, 1 *Law Rep.*, 13; *Hogun agt. Eighth Ave. R.R. Co.*, 15 N. Y., 363; *Ernst agt. Hudson R. R.R. Co.*, 35 N. Y., 38; *McGrath agt. Hudson R. R.R. Co.*, 32 *Barb.*, 147; *Malloy agt. N. Y. Central R.R. Co.*, 58 *Barb.*, 184; *Mulhado agt. Brooklyn City R.R. Co.*, 30 N. Y., 373; *Brown agt. N. Y. Central R.R. Co.*, 34 N. Y., 404; *Creed agt. Hartman*, 29 N. Y., 592; *Keller agt. Hartman*, 24 *How.*, 177; *Ments agt. Second Av. R.R. Co.*, 2 *Robts.*, 357; and affirmed in court of appeals, *Alb. Law Jour.*, Vol. 1, 99). In view of what may be considered the settled law in respect to these questions, this case should have gone to the jury.

The judgment and order appealed from should be set aside, and a new trial ordered.

McCUNN and SEDGWICK, JJ., concurred.

The People *v.* The Board of Apportionment.

SUPREME COURT.

THE PEOPLE *ex rel.*, ROBERT M. GRANT *agt.* THE BOARD
OF APPORTIONMENT AND AUDIT of the City and County
of NEW YORK.

Powers of the board of apportionment and audit are analogous in auditing claims, to those of the boards of supervisors in the several counties.

This board has a discretion as to the amount they shall allow on unliquidated claims.

But it has no discretion when the amount is fixed by law or results from a valid specific contract. When a claimant's salary is fixed by law and he has done his whole duty, he has entitled himself to be paid. And it is not competent for this board to audit such a bill for any less than the whole amount.

The board has a discretion as to how they shall audit a claim, yet it is a legal discretion and must be exercised faithfully and in accordance with legal principles.

New York, Special Term, July, 1872.

THE return to the alternative *mandamus* showed that the board of apportionment and audit had audited and allowed the relator's claim at one half the amount, and a motion was made to quash the return and for a peremptory *mandamus*, to compel the board to audit and allow the relator the full amount of his claim.

FRED. H. KELLOGG, *for relator.*

J. H. STRAHAN, *for respondent.*

Counsel for the relator argued that the amount of the claim having been fixed by law and contract, and the relator having performed his duty, that the board had not the power to audit and allow the claim at any less than the full amount, but should audit and allow it at its full amount, and cited

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The People ex rel., Sherman agt. The Supervisors of St. Lawrence County, (30 How., 181); *The People ex rel. Cagger agt. The Supervisors of Schuyler*, (2 Abb. N. S., 81); *The People agt. The Supervisors of Delaware County*, (45 N. Y., 205).

Counsel for the board argued, that under the statute of January, 1872, (creating the board) that the board had, discretion to allow only one half of the amount or a part of the claim.

PRATT, J.—The return filed by the defendants to the alternative writ of *mandamus* does not contain sufficient allegations to enable the court to determine that they have done their duty under the law. There is no denial that the relator was appointed to an office in the bureau of county affairs, that his salary was legally fixed, and that he faithfully performed all the duties during the time for which he claims pay. Assuming those statements to be true, it was not competent for the defendants to audit the bill for any less amount. While it is true, that a discretion is vested in the board of apportionment and audit as to how they shall audit a claim, yet it is a legal discretion, and must be exercised faithfully and in accordance with legal principles. When a claimant's salary is fixed by law, and he has performed his whole duty, he has entitled himself to be paid. It may be that evidence was taken before the board that satisfied them that the relator had not rendered the services as alleged, or that the salary was not fixed by statute or valid contract, but that does not appear. The return ought to show enough to enable the court to determine whether the reduction was made under the discretion conferred on them by the act appointing them, or an arbitrary reduction made in violation of the rights of the relator, as shown by his papers. The powers of this board are analogous in auditing claims to those of the boards of supervisors in the several counties; and, while the amount which they shall allow on unliquidated claims is

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within their discretion, yet where the amount is fixed by law or results from a valid specific contract there is no such discretion. The return does not show upon what principle the reduction was made. The mere fact that they made a reduction is not conclusive. The case may be adjourned till the 8th of August instant, to enable the defendants to make a further return, on failure of which, peremptory writ may issue.

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N. Y. COMMON PLEAS.

GOLDSMITH *et al.* agt. JONES, *et al.*

No citizen has the right to remove any obstruction on the public street or highway, because such obstruction is a *public nuisance*. No such right exists in any person, except, one who, apart from the injury which he, as one of the public, sustains in common with his fellow citizens, is especially inconvenienced by the obstruction on the street.

Where the plaintiffs caused to be erected without any permission in front of defendant's store on Broadway, N. Y., a triangular box seven feet high, and projecting about two feet and a half from the curb upon the sidewalk, around a telegraph pole, and caused their names and business to be printed upon it, using it as a sign—they occupied the adjoining store to the defendants; and the defendants ordered the plaintiffs to remove the box, and threatened to remove it themselves and to obliterate the sign, and upon the plaintiffs refusing the defendants caused the names and sign on the box to be daubed with paint so as to obliterate them: *Held*, that the defendants were liable to an action for malicious trespass, and were properly arrested and held to bail. Motion to vacate the order of arrest denied.

Special Term, July, 1872.

MOTION to vacate order of arrest.

HAWKINS & K. COTHERON, *for motion*.DAVID MCADAM, *opposed*.

J. F. DALY, J.—The plaintiffs and defendants do business in the building No. 1284 Broadway, on the ground floor, the building is divided into two stores or apartments one of which defendants occupy, and plaintiff have their office in the other; on the sidewalk, in front of defendant's store, stands a telegraph pole close to the curbstone, around this pole, plaintiffs caused to be erected a triangular box seven feet high, and projecting about two feet and a half from the curb upon the sidewalk, and caused their names and business

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to be painted upon it, using it as a sign. This was done without permission of the defendants or of the common council, or other authority. The defendants ordered the plaintiffs to remove the box and threatened to remove it themselves and to obliterate the sign, and upon the plaintiffs refusing, the defendants caused the names and sign on the box to be daubed with paint so as to obliterate them.

The plaintiffs brought this action for malicious trespass, and defendants were held to bail in \$500. The defendants move to vacate the order of arrest, on the ground that the box was a public nuisance which they had a right to abate, and that plaintiffs had no right in such nuisance capable of injury or upon which this action can be founded.

It has been settled in this state, that every encroachment upon the highway is not a public nuisance, that if the encroachment is such that no one, in using the highway, is incommoded, it is not a nuisance. That that which is a common or public nuisance cannot lawfully be abated by the private act of individuals, and that only when the nuisance is especially inconvenient and annoying to a private individual can he remove it (*Griffith agt. McCullum*, 46 Barb., 562).

In that case, the law has been carefully examined, and the authorities in this country and England cited to sustain the decision (*Peckham agt. Henderson*, 27 Barb., 207; *Harrower agt. Ritson*, 37 Barb., 301; *Dimes agt. Pently*, 16 Q. B., 274; *Bateman agt. Black*, 18 Q. B., 870; *Mayor of Colchester agt. Brooke*, 7 Q. B., 339; 57 *Blackstone's Com.*, 5).

Lord CAMPBELL, in *Dimes agt. Pently*, says, "it is fully established by the recent cases, that if there be a nuisance in the public highway, a private individual cannot, of his own authority abate it, unless it does him a special injury, and he can only interfere with it so far as necessary to exercise his right of passing along the highway, and he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if avoid-

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ing it, he might have passed on with reasonable convenience."

These cases dispose of the defendant's claim, that any citizen has the right to remove any obstruction on the public street, because such obstruction is a public nuisance. No such right exists in any person except one who, apart from the injury which he, as one of the public, sustains in common with his fellow citizens, is specially incommoded by the obstruction on the streets.

If this particular box or sign obstructed the entrance to defendant's store, and prevented their carrying on their business except inconveniently, they did not proceed in the proper way to remedy the evil. They attempt to justify their act in painting out the plaintiff's sign, on the ground that it was an abatement of the nuisance, but it is clear that leaving the box standing and obliterating the sign in an unsightly manner, continues the nuisance if it do not increase it.

The utmost defendants could do, if they had the right to remove the structure as a nuisance, was to take it down without unnecessary violence or injury.

"The abatement by the individual must be limited by necessity, and no wanton or unnecessary injury must be committed" (2 *Salk.*, 458)

The destruction of property not necessary to the abatement of a nuisance is unlawful (*Ely agt. Supervisors of Niagara Co.*, 36 *N. Y.*, 300). Nor can defendants justify their act in obliterating plaintiff's sign, on the ground that such sign was calculated to direct plaintiff's visitors to defendant's shop any more than they could justify the act of painting out plaintiff's names on the sign, and painting their own there instead. In neither case, would that be any abatement of a nuisance. The defendants have committed a trespass in thus doing an unnecessary injury to plaintiff's property, and a trespass for which plaintiffs have a perfect right of action.

If the sign were injured by negligence on the part of

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defendant the plaintiffs might have no right of recovery on account of their own negligence in exposing their property on the public street, but they are not debarred from recovering damages from any person who wilfully and maliciously injures their property, because it has been placed on the highway.

In this case, there is the strongest evidence of malice, because the injury deliberately inflicted by obliteration and defacement, could, in no way, benefit the defendants or the public, or lessen the inconvenience of the structure on which the sign was painted.

The suit was properly brought, and the order of arrest cannot be set aside; as to the amount of bail, the sum is moderate for the malice of defendants may enhance the damages, and the plaintiffs may recover, under chapter 573 of laws of 1853, entitled "an act for the more effectual prevention of wanton and malicious mischief," five times the amount of actual damage sustained.

The motion must be denied, with \$10 costs.

Philbrick agt. Dallett.

N. Y. SUPERIOR COURT.

JOHN JAY PHILBRICK, plaintiff, agt. HENRY C. DALLETT,
et al., defendants.

Where it is alleged as a defense by the *acceptors of a draft*, that it was not only without consideration in fact, but in addition was procured by means of a fraud practiced upon the acceptors, and was passed to the holder before acceptance, it is error for the court, on the trial to exclude the evidence offered to prove such facts—the court holding that the plaintiff having given the draft and its acceptance in evidence it was sufficient evidence of its ownership, being in his possession, and it was unnecessary for him to prove its consideration. Assuming that the proof offered by the defendants, would establish the facts sought to be proved, it was not sufficient, as the case stood, to defeat a recovery on the draft:

Held, by the general term, on appeal, that where the acceptance is not only without consideration in fact, but procured by fraud practiced upon the acceptors, the mere taking of the draft on account of an antecedent debt, without giving up or surrendering something of value on the faith of its acceptance, is not enough to constitute the holder a *bona fide* holder for value as against the acceptors.

General Term, April, 1872.

Before BARBOUR, Ch. J., FREEDMAN and SEDGWICK, JJ.

THE plaintiff, a resident of Key West, Florida, sues upon a draft of \$10,000 drawn by Requelme & Co., of Havana, upon and accepted by the defendants, composing the firm of Dallett & Son, at Philadelphia, Pa., to the order of the plaintiff, and dated February 26th, 1869.

The answer contains a general denial of each and every allegation of the complaint, except such as is thereafter specifically admitted, and then sets forth:

1st. That the drawers obtained the acceptance by fraudulent misrepresentations, upon which defendants relied, and of which the plaintiff was cognizant before such acceptance was made.

2d. That there was a failure of consideration between the

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drawers and defendants, of which also the plaintiff knew before acceptance, and

3d. That the plaintiff never owed the bill or acceptance at all; that he never parted with any value or consideration for it, and that it had always remained the property of Requelme & Co., so far as any property in it could be said to exist.

Upon the trial before the court and a jury, plaintiff, as a witness on his own behalf, produced the draft, which was read in evidence, and proved its acceptance by defendants on the 18th day of March, 1869, and the interest due thereon.

The question put to him, "Are you the owner of that note?" the court excluded as unnecessary, as possession of the draft was sufficient.

The court also declared it unnecessary for the plaintiff to prove the consideration of the draft in question.

Plaintiff thereupon rested.

The defendants, to maintain the issue on their part, called the plaintiff as a witness on their side, and from the testimony it appeared that some time in February, 1869, Mr. Requelme came to Key West and, while there, purchased from plaintiff a sunken steamer, called the *Ruby*, for which he promised to send plaintiff either a draft or the cash within ninety days; that no bill of sale was made of the vessel, nor any record concerning her in the custom house, or any other office in the United States government; that Mr. Requelme thereupon left for Havana, and thence remitted the draft in question, which had not yet been accepted; that the draft came accompanied by a letter which read as follows:

"Havana, 26th February, '69. John Jay Philbrick, Esq., Key West. Dear sir, herewith, \$10,000 in cy., 60 days, on Dallett & Son, Phila., which you will please collect and hold at the disposal of our Senor Don Manl. Requelme. We are, dear sir, yours very truly, M. REQUELME & Co."

That plaintiff kept the draft on hand for about two weeks, and sent it to a New York house for acceptance and collec-

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tion; that the steamer so sold was never moved, that she remained sunk, and at the time of the commencement of this action, was in the same state that she was sold in, and that no storm had occurred to hurt or injure her. Plaintiff insisted, however, that he had delivered her over to M. Requelme at the time of the sale.

The defendants next called Henry C. Dallett as a witness, and offered to prove by him the real nature of the transaction between the firm of M. Requelme & Co. and defendants, with a view of showing that the draft was a fraud upon the defendants.

The court excluded the proposed evidence, and defendants excepted.

The defendants then offered to prove, that there was no consideration between the drawers and acceptors, claiming to have laid the foundation for such proof by showing that the alleged consideration between the plaintiff and the drawers of the draft was prior to the acceptance of the draft by the defendants, and was not on the faith thereof.

The court excluded the evidence, holding that it would assume that the proof offered would establish the facts sought to be proven, but that they were not sufficient, as the case stood, to defeat a recovery on the draft.

Defendants excepted.

Defendants finally asked permission to go to the jury on the question whether Philbrick, the plaintiff, ever parted with any value for the draft.

The court denied such request, and defendants excepted.

The court directed a verdict for the plaintiff for the full amount of the draft, with interest, \$11,785, to which direction defendants excepted.

The court ordered defendants exceptions to be heard in the first instance at general term, and the entry of judgment to be suspended in the meantime.

WM. W. GOODRICH, *for plaintiff.*

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JOSEPH J. MARRIN, *for defendants.*

By the court, FREEDMAN, J.—In excluding defendants' proposed evidence as to fraud by the drawers upon them, by means of which they were induced to accept the draft, and as to a failure of consideration between them and the drawers, the learned judge who presided at the trial, clearly erred. He probably assumed that the plaintiff had sufficiently shown himself to be a *bona fide* holder of commercial paper for value paid on the faith thereof. But such was not the fact. The sale of the steamer *Ruby*, being a transaction between the plaintiff and M. Requelme individually, the plaintiff, under the direction of the firm of M. Requelme & Co., contained in the letter accompanying the draft to collect the same and hold the proceeds subject to the order of M. Requelme, and in the absence of proof showing an appropriation by M. Requelme, of the said proceeds to plaintiff's use, appeared, so far as the evidence went, in the character of a mere naked holder possessing authority to collect for the benefit of the true owner; especially, as the court had, at an early stage of the trial, excluded as unnecessary the proof offered by plaintiff to establish actual ownership, and had ruled proof of possession to be sufficient.

Even upon plaintiff's theory, however, that he took the draft before acceptance for the debt of M. Requelme, the evidence was admissible. In such case, and as the evidence then stood, plaintiff took the unaccepted draft on account of an antecedent debt, without parting with any value upon the faith of either the draft or its acceptance, and defendants were not precluded from showing that their subsequent acceptance was procured wholly by the fraud of the drawers and was, in point of fact, wholly without consideration. That was one of the very issues raised by the answer, and, if established as we must assume it would have been but for such erroneous exclusion, would have cast the burden of proof upon the plaintiff, to establish that he was an innocent actual

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owner and holder of the draft for value paid on the faith of its acceptance.

As against the holder of a draft the acceptor, as a general rule, stands in the same position as the maker of a promissory note, and the drawer in the same as the indorser. By his acceptance the acceptor admits that he has funds of the drawer in his hands to pay it. He is, in such case, regarded as the principal and the drawer as his surety, and the accepted draft imports a debt due from the acceptor to the drawer, which is assigned to the payee. The instrument being one of those which on account of their negotiable quality and universal convenience in mercantile affairs, are specially favored by the law. If A. in the course of trade, parts with value on the faith of B.'s acceptance, the law, to protect A., as an innocent holder for a valuable consideration, against B.'s contradicting the words "value received" written above his promise, presumes a consideration to exist, and B. will not be permitted to overthrow such presumption by actual proof to the contrary.

But this rule applies only to a *bona fide* holder for a valuable consideration, and the doctrine as to what constitutes a person such *bona fide* holder for value, again varies in cases presenting a wide and marked distinction.

Thus, in *Cole agt. Saulpaugh*, (48 Barb., 104), and *Schepp agt. Carpenter*, (49 Barb., 542), the holder of an accommodation note, which had been given by the maker without restriction as to the manner in which it should be used by the payee, was held to be a *bona fide* holder for value as against the maker, notwithstanding it appeared that he took it for an antecedent debt and with notice of its character as accommodation paper. These decisions are based upon the fact that the payee, not being limited or restricted as to the manner of its use, had a right to apply it to the payment or security of an antecedent debt, or to sustain his credit with it in any other way.

So, in the absence of fraud, an acceptance has been held

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to involve a consideration, inasmuch as it delays the holder's resort to the drawer, which he might have immediately in case of non-acceptance; and for the same reason a subsequent acceptance, before maturity and for the accommodation of the drawer, has been held to inure to the benefit of the holder who discounted the draft before acceptance in the expectation, justified by a previous course of dealing, that it would be so accepted (*Mechanics' Bank* agt. *Livingston*, 33 *Barb.*, 458).

But when the acceptance is not only without consideration in fact, but, in addition, has been procured by means of a fraud practiced upon the acceptor, an entirely different rule prevails. Here, the mere taking of the draft on account of an antecedent debt, without giving up or surrendering something of value on the faith of its acceptance, is not enough to constitute the holder a *bona fide* holder for value as against the acceptor. The doctrine of *Swift* agt. *Tyson*, (16 *Peters U. S.*,), has not been followed in this state. On the contrary, our courts held, at quite an early day, that the receipt of commercial paper fraudulently put in circulation, or diverted from the purpose for which it was originally issued, merely as payment or security for a precedent debt, no new credit or other thing of legal value being given on the faith thereof, and no security being relinquished or discharged, nor any new responsibility incurred on the credit thereof, is not parting with value, such as to enable the holder to enforce such commercial paper against an accommodation party, or to hold it against the true owner or to hold it free of equities existing upon it against the transferrer at the time of the transfer.

This rule has been firmly maintained, both at law and in equity, by a long and uninterrupted series of adjudications, and is, beyond question, the settled law of this state (*Coddington* agt. *Bay*, 20 *Johns.*, 637; *affirming*, *S. C.*, 5 *Johns. Ch.*, 54; *Stalker* agt. *McDonald*, 6 *Hill*, 93; *Wardell* agt. *Howell*, 9 *Wend.*, 170; *Rosa* agt. *Brotherson*, 10 *Wend.*, 86; *Hart* agt. *Palmer*, 12 *Wend.*, 523; *Ontario Bank* agt.

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Werthington, 12 *Wend.*, 593; *Payne* agt. *Cutler*, 13 *Wend.*, 606; *Morton* agt. *Rogers*, 14 *Wend.*, 576; *Commercial Bank* agt. *Norton*, 1 *Hill*, 501; *Manhattan Co.* agt. *Reynolds*, 2 *Hill*, 140; *Scott* agt. *Betts*, *Hill & D. Supp.*, 363; *Elliott* agt. *Dudley*, 19 *Barb.*, 326; *Francia* agt. *Joseph*, 3 *Edw. Ch.*, 183; *Clark* agt. *Ely*, 2 *Sandf. Ch.*, 166; *Furniss* agt. *Gilchrist*, 1 *Sandf.*, 53; *Stewart* agt. *Small*, 2 *Barb.*, 559; *Mickles* agt. *Colvin*, 4 *Barb.*, 304; *Spear* agt. *Myers*, 6 *Barb.*, 445; *Clark* agt. *Gallaher*, 20 *How.*, 308; *Farrington* agt. *Frankfort, Bk.*, 31 *Barb.*, 183; *Prentiss* agt. *Graves*, 33 *Barb.*, 621; *Cardwell* agt. *Hicks*, 37 *Barb.*, 458; *West* agt. *Am. Exchange Bk.*, 44 *Barb.*, 175; *Crandall* agt. *Vickery*, 45 *Barb.*, 156; *McBride* agt. *Farmers' Bk.*, 26 *N. Y.*, 450; *Lawrence* agt. *Clark*, 36 *N. Y.*, 128).

It is only where a creditor receives a negotiable paper fraudulently put in circulation, or diverted from its purpose, in good faith, and in actual satisfaction and discharge of a prior indebtedness, so that unless such paper is available in his hands, he loses the demand, that this is considered as parting with value. In such case, the actual discharge of the personal responsibility of the debtor is equivalent to parting with securities or to paying money. The extinction of a legal demand in its original form is, however, to be proved affirmatively; and the question whether a party is a holder for value, so as to displace in his favor any right or equity of prior parties, depends upon the fact being established of an intended and actual extinguishment (*N. Y. Exchange Co.* agt. *De Wolf*, 3 *Bosw.*, 86, and authorities there cited).

Time and space do not permit me to make a more extended reference to the authorities cited than I have done, and I will conclude, therefore, by calling attention yet to the following decisions of a comparatively recent date, which deserve to be carefully noted:

In *McBride* agt. *The Farmers' Bank* (26 *N. Y.*, 450), and *Commercial Bank of Clyde* agt. *Marine Bank* (6 *Abb. N. S.*, 33; *S. C.*, 3 *Keyes*, 337), it was held that a bank does not

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become a purchaser for value of demands remitted to it for collection, by reason of its having a balance against the remitting bank, for which it has refrained from drawing, and of its having discounted notes for the latter upon its indorsement, in reliance upon a course of dealings between the banks to collect notes for each other, each keeping an open account of said collections, treating all the paper sent for collection as the property of the other, and drawing for balances at pleasure.

In *Bright* agt. *Judson* (47 Barb., 29), it was expressly decided, that fraudulent representations by which one is induced to accept a bill, are a bar to a recovery thereon by a holder who took the bill in payment of an antecedent debt, without surrendering something of value upon the faith of such acceptance.

And in the *Farmers and Mechanics' Bank* agt. *The Empire Stone Dressing Co.*, (5 Bosw., 289), the decision was that to entitle one to enforce an acceptance, which is otherwise invalid (whether for want of power in the agent who wrote the acceptance to bind his principal, as in that case, or for fraud practiced by the drawer upon the acceptor, as in the case at bar, makes no difference), on the ground that he is a *bona fide* holder for value, it must appear that he parted with value upon the faith of such acceptance. He may be a *bona fide* holder of the bill for value paid therefor, and be entitled to enforce it against every other party thereto, and yet, have no right to recover on such acceptance.

In view of the authorities referred to, it is entirely clear, that defendants had an unquestionable right to prove the facts embraced in the two offers made, and that the exclusion of their proposed evidence constituted error.

Defendants' exceptions to such exclusion of their evidence and to the direction of a verdict against them must, therefore, be sustained, and the verdict must be set aside and a new trial ordered, with costs to defendants, to abide the event.

BARBOUR, Ch. J. and SEDGWICK, J. concurred.

Dodge agt. Wellman.

COURT OF APPEALS.

JOHN DODGE, executor, &c., of JOHN MCBURNEY, appellant,
agt. LEMUEL WELLMAN, respondent.

Where the defendant, in possession of real estate, under a contract to purchase the same of the owner—having made partial payments on the consideration price and made improvements upon the premises, enters into a *parol* agreement with the plaintiff for an advance of money to enable him to pay up the purchase price of the premises to the owner, that the plaintiff as his security is to take the legal title from the owner, and to execute a written agreement to the defendant to convey to him the title on payment by the defendant of such advance with interest, at a specified time, which *parol* agreement is fulfilled so far as the defendant is concerned, by having the deed made, executed and delivered to the plaintiff, on receiving such advanced sum; and the plaintiff thereupon refuses to execute and deliver to the defendant the writing declaring the rights of the defendant under the *parol* agreement, but sets him at defiance, and commences an action of ejectment against him to recover possession of the premises:

Held, that so gross a fraud ought not to be permitted, and that the principles upon which courts of equity enforce agreements that have been in part performed are an adequate protection to the defendant.

There is nothing in the *statute of frauds* which in any degree interferes with the equitable jurisdiction of a court of equity in such cases, but on the contrary, either with or without the saving clause in the statute (in reference to agreements for the sale of lands, &c., to be in writing, &c.) the court always prevents the use of the statute as a cover and protection to the fraudulent party.

THIS case (in supreme court) is reported in 42 *Barb.*, 390, under the title of *McBurney agt. Williams*, where the facts are fully stated.

WOODRUFF, J.—The statute of frauds, while it requires that every contract for the sale of any lands or any interest in lands shall be void, unless the same, or some note or memorandum thereof expressing the consideration, be in writing subscribed by the party by whom the sale is to be made, at the same time, in terms, declares that this provision shall not be construed to abridge the powers of courts of equity to

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compel the specific performance of agreements in cases of part performance (2 R. S., §§ 8, 10).

If, therefore, the relation between the plaintiff's testator and the defendant, established by the transaction in question, be that of vendor and vendee, the question arising thereupon is, has there been such a part performance of the parol agreement by the defendant, that a court of equity would enforce the agreement against the plaintiff?

And on the other hand, if the relation established by the transaction between the defendant and the testator, be that of mortgagor and mortgagee, then the questions whether the defeasance can be proved by parol, and can the plaintiff be permitted to sustain an ejectment and turn the defendant out of possession?

In my opinion, the facts found by the court on the trial, present a case of a mixed nature, in which the plaintiff was clearly a lender of money to the defendant which the latter was bound to repay, and which the testator could have compelled him to repay, and in which, for the testator's security, he was substituted for the former owner of the premises, agreeing as vendor, to convey the premises to the defendant on the repayment of the sum advanced within five years, with interest thereon, payable annually in the meantime.

Now, as to such an agreement, it is not material whether proof of the facts be regarded as establishing that the testator was mortgagee or vendor; if, upon the facts found, a court of equity for the prevention of fraud and injustice will enforce the agreement, the action cannot be sustained.

To the right apprehension of the case, it is not enough to say, that the testator, being the holder of the legal title, agreed by parol to convey it upon the payment, or the repayment, to him of the sum named, and this agreement the defendant now relies upon. That is a very incomplete presentation of the case, we must go further back, viz.: to the status of the parties when the parol agreement was made. See what the agreement was, and what was done towards

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the performance thereof, and finally in what condition the parties are left if the further performance is refused, and then the question whether this will be permitted by a court of equity, will be prominently exhibited.

The defendant was the equitable owner in possession of the land in question. He held an agreement, valid in law and in equity, for the conveyance to him of the legal title on payment of the price, that price he had in part paid, and had in reliance upon his equitable title, cultivated the land as a farm, and "made betterments and improvements thereon."

This constituted him the equitable owner, and the vendor (Hunting), trustee in equity, holding the legal title subject to the equitable rights of the defendant, the latter could have compelled a conveyance to himself beyond all question.

In this condition of the title, the residue of the purchase money being about to become payable, the defendant applied to the testator and requested him to advance the money (\$284), and take the conveyance to himself, giving to the defendant his contract for the conveyance of the land on repayment to him of the money so advanced, and it was thereupon by parol agreed that the defendant should procure the conveyance to be made to the testator, he should advance the money and give the defendant such contract for the conveyance to him upon the payment of such advance, in five years with interest payable annually.

Now, it may be conceded, that while this agreement remained wholly executory, the parties could not have enforced it either at law or in equity, but it did not so remain. The defendant at once entered upon its performance; he surrendered to the original vendor his contract of purchase, as a consideration for a conveyance to the testator, and procured a conveyance to be made by the former vendor to this plaintiff, received the deed himself and carried and delivered it to the latter, who, thereupon advanced the money stipulated for, delivering the check therefor to the defendant. There-

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upon the testator sets him at defiance, refuses to give him any contract or writing declaring the rights of the defendant, and now prosecutes an ejectment to turn the latter out of possession.

So gross a fraud ought not to be permitted, and I am quite certain, that the principles upon which courts of equity enforce agreements that have been in part performed, are an adequate protection to the defendant.

The moment the testator had received the deed procured for him by the defendant, and had refused to execute a proper instrument declaring the terms upon which the defendant had invested him with legal title, the court of equity would have entertained a bill to compel such a declaration.

The prevention of fraud would have been ample ground for equitable interposition, and nothing in the statute of frauds, in any degree interferes with the exercise of that jurisdiction; but on the contray, either with or without the saving in the statute above referred to, the court always prevents the use of the statute as a cover and protection to the fraudulent party.

And as courts of equity will assume for the purpose of testing the rights of the parties, that that is done which ought to be done, and which, upon the facts disclosed, the court would compel the plaintiff to do, this action will be disposed of as if the testator had performed his parol agreement, by executing and delivering the writing which he agreed to deliver, and in expectation whereof, the defendant surrendered his former contract, and procured a conveyance of the land to the testator.

The leading case of *Parkhurst agt. Van Cortlandt*, (14 Johns., 15), is in full support of these views, and subsequent cases unfold and apply the principles that a party will not be permitted to insist upon the statute of frauds to protect him in the enjoyment of advantages procured from another in faith of the oral agreement on which the latter has acted,

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and in faith hereof he has placed himself in a situation in which he must suffer wrong and injustice (See *Brown* agt. *Lynch*, 1 *Paige*, 147; *Lowery* agt. *Tew*, 3 *Barb. Ch.*, 407; *Hoges* agt. *Tennessee Marine & Fire Ins. Co.*, 8 *N. Y.*, 416; *Despard* agt. *Walbridge*, 15 *N. Y.*, 374; and *Ryan* agt. *Dox*, 34 *N. Y.*, 307; and other cases there collected, 2 *Story's Eq. Jur.*, § 759, *et seq.*).

It is, however, insisted that this is not a bill by the defendant to compel the performance of the parol agreement, but an action by the alleged vendor to recover the possession, and that even admitting that the defendant will be in equity entitled to his deed on payment of the price, the testator was entitled to the possession in the meantime.

That depends upon the intent of the parties appearing upon a view of the entire transaction. The defendant was in possession, and had, by the acquiescence of the former vendor, been in possession, making improvements, &c., for many years; in substance, the testator consented to be placed in the shoes of such vendor. Nothing is stipulated in regard to any surrender of possession, by the defendant and nothing indicates that the testator expected it, I think it clear, that the former vendor would not have been permitted, so long as the defendant was not in default, to have deprived the defendant of the possession of the land and the enjoyment of the improvements he had been induced to make by the contract, and the possession given to him under it; and it is equally clear, that the testator to entitle him to possession, should have shown affirmatively, that a change in this respect was agreed to when he consented to be substituted in the place of the vendor.

Besides this, however, it is conclusive against this claim of the testator, that the parol agreement as found by the court, provides, that the testator shall have interest paid to him annually on the sum advanced.

This not only indicates that the advance was understood and treated as a mere loan, whatever was the technical

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form of the transaction ; but it indicates moreover, that the parties meant that the testator should have interest, and the defendant have the rents and profits. It would be plainly inequitable that the testator should have the use of the land and interest also. This, of course, does not happen whenever a mortgagee is in possession, but always subject to an accounting by the latter in which such rents and profits are applied towards satisfaction of the mortgage debt and the interest thereon.

Here it was contemplated, that the defendant should continue to occupy, as he did occupy when and long before and for more than two years, after the agreement with the testator was made. The plaintiff will be left to pursue his remedies under the agreement, but was not in equity entitled to possession in this action.

I think, the order appealed from should be affirmed, and judgment absolute for the respondent, with costs, be ordered pursuant to the appellant's stipulation.

Johnson agt. Oppenheim.

N. Y. SUPERIOR COURT.

FRANK JOHNSON *et al.*, plaintiffs and respondents, agt.
CHARLES J. OPPENHEIM *et al.*, defendants and appellants.

A *covenant for quiet enjoyment* in a lease means only that the tenant shall not be evicted by a paramount title. It relates only to the title, and not to the actual possession or undisturbed enjoyment, where there is no eviction from the premises demised.

So long as the tenant remains in possession and use of a part of the building, it is conclusive evidence against him that it has not been destroyed and that it is not untenable within the meaning of the act of 1860.

It must be taken to have been the true intention of the legislature in the passage of the act of 1860, to absolve the lessee, in the cases contemplated by the statute, from the payment of rent, provided he avails himself of the privilege given to *quit and surrender possession* of the leasehold premises and of the land so leased or occupied.

It is no *surrender* in law or in fact, of leasehold premises by a tenant in possession claiming that the premises have become untenable, and his right to abandon under the act of 1860, where he moves out on a previous notice to the landlord, and delivers to him the key of the main building, (which is refused) but leaves a sub-tenant of the lessee of a portion of the building, in undisturbed possession of his portion with a key to another outer door of the same, also in his possession. The possession of the sub-tenant is that of the tenant as respects the rights of the landlord under the statute.

General Term, March, 1872.

Before FREEDMAN, CURTIS and SEDGWICK, JJ.

APPEAL from judgment entered upon the verdict of a jury, and from order denying defendants' motion for a new trial upon the judge's minutes.

The action was brought to recover \$3,500, a quarter's rent, due November 1st, 1869, of the premises, with the buildings thereon, known as No. 475 Broadway, running through to Mercer street, under a lease of the premises made by the plaintiffs, the owners, to the defendants, dated January 15th, 1869, for five years from May 1st, 1869, at the annual rent of \$14,000, payable quarterly.

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The lease contains the usual covenant on the part of the defendants, as lessees, to pay the rent, and a covenant on the part of the plaintiffs, that the defendants, on paying the said rent reserved, and fulfilling all the covenants and agreements on their part, shall, during the term granted enjoy and quietly hold said demised premises, without let or hindrance of the plaintiffs, their successors, heirs or assigns, or any other person whatever. It also contains the following provision :

"And the premises hereby demised are to be used in the business of importers and manufacturers of and dealers in cloaks and mantillas, and for any other purposes or business not more hazardous, as respects fire, than the business aforesaid, but for no other business, without written permission first had of the said party of the first part," &c.

The defendants, by their answer, admitting the lease, and their entry and occupation of the premises thereunder down to October 1st, 1869, set up for defense :

First. That on the 1st of October, the premises having become untenable, without fault on their part, they surrendered possession, the principal cause of the injury to the premises having been the improvements on the adjoining property, against which the answer alleges that the plaintiffs did not provide proper or requisite precautions.

Second. That by the improvement of the adjoining premises, certain windows in the north gable wall of the building leased, which were useful and important for the purposes of their business, were closed, and that they surrendered on that account.

Third. The defendants admit their liability for the rent down to October 1st, 1869, the date of their alleged surrender, \$2,333 34, and offer judgment for that amount.

The court having awarded the opening, and close to the defendants, they gave evidence tending to show that about the 1st of June, 1869, Mr. William C. Rhinelander, the owner of the lot adjoining on the north, tore down the old building standing on his lot, and proceeded to excavate the

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same for the purpose of erecting a new building thereon, but that by reason of the defendants' refusal to give the necessary license, the building leased was not properly shored up; that as the excavation proceeded, the foundation of the north wall of the building gave way in part, and the wall itself and the lower floors of the building were consequently weakened and impaired solely in consequence of the building not being shored up; that on the 24th day of August, a portion of the ground floor settled a foot or two, and the stairway to the second floor, the ceilings, &c., were more or less disturbed. On that day the defendants wrote to the plaintiffs, that by reason of the settling down of the floor the premises had become untenable, and that they should, therefore, be compelled speedily to vacate the premises, and asking with whom and where they should leave the key. The plaintiffs replied, that they should decline to receive the key. The defendants continued to occupy the store, being more or less incommoded by the results of the excavation, until October 1st, and meantime, the erection of the new building adjoining closed up the windows on the north gable. On the 30th of September, the defendants having moved out their stock of goods, &c., sent the key of the front door of the store on Broadway, by express, to the plaintiffs, and wrote them by mail to that effect, stating that they had vacated the premises in consequence of the same having become untenable. The defendants refused to receive the key, and replied by mail, October 2d, that they wholly refused to accept any surrender of the premises, or to accept the key, and would hold the defendants liable for all rent to accrue under the lease, and denying that the premises had been rendered untenable, but that if they had, it was solely occasioned by the defendants' persistent refusal to allow the property to be shored up and protected against the adjoining excavation.

There was no pretense of any other surrender or attempt at surrender of the premises on the part of defendants, than this of October 1st.

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Between the date of the execution of the lease and of the commencement of the term, the defendant executed to one Fisher, a manufacturer, a written lease of the entire fourth floor of the building and of a portion of the third floor for the entire period of the defendants' term under the lease. Under this lease Fisher entered into possession in May, 1869, of the portion of the premises so leased to him, and continued so to occupy the same and to carry on his business therein, until after the expiration of the quarter for the rent of which this action is brought. When the defendants quitted their part of the building and sent the key of the store to the plaintiffs, they left him in possession of the third and fourth floors, and took no proceedings whatever to remove him. It appears also, that the key which the defendant sent by express was only the key of the store; that the entrance to the lofts occupied by Fisher, was by a separate outer door and stairway on Broadway, to which there was another and different key, and that no offer of this key was made to the plaintiffs. The defendants offered to prove that Fisher had agreed to go out when they did, and they only received rent from him up to the time they left; but this evidence was excluded as immaterial. Upon this state of facts, the defendants having rested, the plaintiffs moved the court to direct a verdict in their favor for the whole quarter's rent, insisting that the defendants had proved no surrender, and the court so ordered, and the defendants excepted. Defendants' counsel submitted a series of requests to charge the jury, but the court refused to charge any of them, and defendants' counsel excepted to each refusal separately.

The jury, by direction of the court, found a verdict for the plaintiffs for \$3,985 10.

The defendants' counsel then moved for a new trial on the minutes of the judge, upon the legal exceptions taken in the course of the trial; on the exceptions taken to the refusal of the court to charge as requested by the defendants; on the exceptions taken to the charge of the court as delivered,

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and also upon the ground of insufficient evidence to warrant the direction of the court to the jury to render such a verdict, or to warrant the jury in rendering such a verdict.

The motion was denied by the court, and to the decision of the court in that behalf, and each and every part of it the defendants' counsel then and there duly excepted.

Judgment was thereafter entered upon the verdict, and defendants appealed from the judgment, and also from the order denying the motion for a new trial.

JOHN GRAHAM, *for defendants and appellants.*

JOSEPH H. CHOATE, *for plaintiffs and respondents.*

By the court, FREEDMAN, J.—The covenant for quiet enjoyment contained in the lease means only that the tenants shall not be evicted by a paramount title. It relates only to the title, and not to the actual possession or undisturbed enjoyment, where there is no eviction from the premises demised.

Nor is there any actual or implied contract or warranty on the part of the plaintiffs in this case, that the premises demised shall be or continue fit for the purposes of defendants' business. The clause contained in the lease, which requires the premises to be used in the business of importers and manufacturers of and dealers in cloaks and mantillas, or for any business not more hazardous, as respects fire, than the business specifically mentioned, cannot be construed into any such implied contract or warranty (*Howard agt. Doolittle*, 3 *Duer*, 464; *Doupe agt. Genin*, 1 *Sweeny*, 29; *affirmed*, 45 *N. Y.*, 119).

Myers agt. Burns, 35 *N. Y.*, 269, is not an authority for the proposition that it should be so construed. In the last mentioned case, the landlord had leased the premises "as a first class hotel," and had covenanted "to keep the said hotel and premises in good necessary repair during the term, at his own proper charge and expenses."

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To defeat plaintiffs' action, therefore, defendants had either to prove an eviction, or to bring themselves within the provisions of the act of 1860, and before the verdict rendered against them, pursuant to the direction of the court, can be upheld, it must appear clearly, that they failed to do either. The defendants had the affirmative of the issue. There being no conflict of evidence, when they rested their proofs, all presumptions and inferences which they would have had a right to ask the jury to draw in their favor from the facts proven, if the case had been submitted to the jury, are to be conceded to them.

The adjudications of this state, bearing upon the general subject of interference by landlords with tenants, may be assorted into three distinct and entirely different classes of cases, the remedy for each class being peculiar to it, viz :

1st. Cases where the tenant is evicted, without the wilful or voluntary agency of the landlord, from the whole or some part of the demised premises; as for example, an eviction of the tenant by title paramount of the contiguous proprietor. Here, if the eviction is from the whole premises, the tenant is not chargeable with rent; but if it be from a part of the premises, the law, in its inability to impute blame to the landlord for the act of another person, requires the rent to be apportioned, so that the tenant shall be liable to pay for such portions of the premises as he retains (*Moffat agt. Strong*, 9 *Bosw.*, 57; and see *Mark agt. Patchin*, 29 *How.*, 20).

2d. Cases where the landlord commits an act or acts of trespass, which interfere, more or less, with the beneficial enjoyment of the premises, but which leave the demised premises intact, and do not deprive the tenant of any part of them, so that, though he may be injured, he is not, thereby dispossessed. Here the rule is, inasmuch as the wrongful act of the landlord stops short of depriving the tenant of any portion of the premises, that such trespass is no defense against the liability for rent, and the tenants' sole remedy therefor is an action for damages against the wrongdoer

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(*Edgerton agt. Paige*, 20 N. Y., 283; *Lounsberry agt. Snyder*, 31 N. Y., 514; *Cram agt. Prosser*, 2 Sandf., 120; *Mortimer agt. Bruno*, 6 Bosw., 653; *Peck agt. Hiler*, 31 Barb., 117).

3d. Cases where the landlord enters wilfully upon and expels the tenant, actually or constructively, from a part of the demised premises. Here the rule is, that the whole rent is suspended during the term, though the tenant continue in possession of the residue (*Christopher agt. Austin*, 1 Kern., 217; *Peck agt. Hiler*, 24 Barb., 178).

No eviction, actual or constructive, within the decision of any of these cases has been proved in the case at bar. The right of William C. Rhinelander, the owner of the lot adjoining the premises in question on the north, so to improve and build upon his own lot, as to shut up the windows in the north wall of the premises demised to the defendants, there being no question of ancient lights, cannot be disputed, and as the lease contains no covenant against it, the closing up of said windows by Rhinelander cannot be tortured into an eviction, actual or constructive, of the defendants from the whole or any part of the demised premises. Even had the plaintiffs themselves owned Rhinelander's lot and built on such land in such a manner as to obstruct and darken the windows in the premises demised, such act, even if it were a ground for damages, would not have operated as an eviction (*Palmer agt. Wetmore*, 2 Sandf., 316; *Parker agt. Foote*, 19 Wend., 309; *Meyers agt. Gemmel*, 10 Barb., 537).

Not having shown an eviction independently of the act of 1860, the next inquiry is, whether defendants have brought themselves within the provision and purview of that act.

Now it is true, that the literal reading of the statute is, that if a building, without any fault or neglect on the part of the lessee, be destroyed, or be so injured, as to be untenable and unfit for occupancy, the lessee shall not be liable to pay rent after such destruction or injury, unless

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otherwise expressly agreed, and may quit and surrender the possession. The defendants claim the benefit of such literal reading, and insist that the statute should be so construed as to mean that, whenever the demised premises become untenable and unfit for occupancy, that constitutes an eviction of the lessee, suspending the right of the landlord to rent so long as it lasts, and that, in addition to this, the lessee may quit and surrender and thus absolutely annul the lease; that he has this option, but is not bound to exercise it. But as such literal interpretation would lead to the absurd consequence, in case of the destruction or unfitness of only a comparatively small part of the demised premises, of continuing the lessee in the enjoyment and occupation of the premises, and yet absolving him from all rent, it cannot be adopted. As laws must necessarily deal in generals, and cannot descend to particulars, and as the interpretation of them is the application of them to particular cases, and as the presumption is against an absurd intent, whenever the words taken in their ordinary sense would lead to such a consequence, it is the duty and province of the courts to so far restrict their meaning as to avoid such a consequence. *Domat* says upon the point: "Whenever it appears that the sense of a law, how clear soever it may appear in the words, would lead us to false consequences, and to decisions that would be unjust, if the law were indifferently applied to everything that is contained within the expression, the palpable injustice that would follow from this apparent sense, obliges us to discover by some kind of interpretation, not what the law says, but what it means, and to judge by its meaning, how far it ought to be extended, and what are the bounds that ought to be set to its sense." The interpretation here referred to is to be guided again by certain well established rules, and one of the most prominent of these, and one which helps us most in the discovery of the true meaning of the law, is the reason of the law, or the cause which moved the legislature to enact it. This ought not to

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be confounded with the mind of the law ; for that is nothing but the genuine meaning of it, for the finding out of which we call in the reason of it to our assistance.

Another rule is, that in case of doubt, a statute consisting of divers parts or clauses is to be judged by looking at the whole, and to be construed so as to carry out the intention of the law-making power. The whole context may be considered in endeavoring to collect such intention, although the immediate object of the inquiry be the meaning of an isolated clause.

The reason and spirit of cases, therefore, make the law, and not the mere letter.

Now what was the reason for the passage of the statute in question, and the main intent of the legislature in enacting it?

At the time of such passage the law was firmly settled, by a long series of adjudications in the English courts as well as our own, that upon a lease for years, with a covenant to pay a stipulated annual rent, the rent is payable by a lessee to the end of his term, though the property be destroyed by fire, and that the lessee has no relief against an express covenant to pay the rent, either at law or in equity, unless he has protected himself by a stipulation in the lease, or the landlord has covenanted to rebuild. This rule operated so harshly in many cases that, as is well known, the legislature interfered by the passage of the act now under consideration. The act, in the absence of a written agreement or covenant to the contrary, reverses the prior rule of law and affords relief not only against fire, but against the elements generally and any other cause, by which the building may be so far injured as to be untenable and unfit for occupancy. But it makes no apportionment or division of the building, or of its destruction, untenableness or unfitness. Consequently, so long as the lessee remains in possession and use of a part of the building, it is conclusive evidence as against him that it has not been destroyed and that it is not untenable or unfit for occupancy within the meaning of the act.

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In order to give due weight and effect to these various considerations, which have been noticed, it must be taken to have been the true intention of the legislature to absolve the lessee, in the cases contemplated by the statute, from the payment of rent, provided he avails himself of the privilege given to quit and surrender possession of the leasehold premises and of the land so leased or occupied. The reason and purpose of the law and the nature of the grievance it was designed to remedy forbid us, as the respondents have correctly argued, to construe the two clauses of the statute independently of each other, or to give the lessee the benefit of the relief from the rent except upon the condition of his quitting and surrendering the possession.

It remains, therefore, to be considered whether the defendants have quitted and surrendered such possession.

According to the evidence the defendants forwarded the key of the outer door to the store on the first story, to the plaintiffs by express, and at the same time, September 30, 1869, advised plaintiffs of it by letter through the post-office. Plaintiffs acknowledged the receipt of the letter under date of October 2, 1869, and absolutely refused to accept any surrender of the premises, or the key, upon the ground that the premises were not untenable, and that, if they were, it was the fault of the defendants in consequence of their persistent refusal to allow the building to be protected against the consequences of the excavation on the adjoining lot. Plaintiffs also notified defendants that they, the defendants would be held liable for all rent to accrue under the lease. If the surrender was complete in fact and sufficient in law, the reasons assigned by plaintiffs for their refusal to accept it, are wholly immaterial. If incomplete and insufficient, defendants were not relieved by any of the grounds upon which plaintiffs based their refusal, or the manner of such refusal, from the necessity of making an effectual surrender. The evidence further showed, that the defendants had executed a written lease, for the whole unexpired term of their

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own lease, to one Fisher, of the fourth and part of the third story of the building in question, that under this sub-lease Fisher had entered into possession and was engaged in the manufacture of tassels and fringes upon said premises and employed fifteen or twenty people in that business; that at the time of defendants' removal from the building they left Fisher behind in the occupation of the parts leased to him, and that he remained in the occupation and full enjoyment of those parts for a month or two after the first day of October, 1869. It also appeared that defendants took no proceedings whatever to remove Fisher; that the key sent by them by express was only the key of the store; that the entrance to the upper stories occupied by Fisher was by a separate outer door and stairway on Broadway, to which there was another and different key, and that no offer of this key was made to the plaintiffs. As Fisher's title was good against the plaintiffs and his continued occupation constituted, in judgment of law, possession by the defendants, the surrender, made by the latter of the key of the store, leaving Fisher in possession of the upper part of the building, was no surrender in law or in fact, of the possession of the leasehold premises and of the land covered by their lease, within the meaning of the act of 1860. The defendants, therefore, continued liable on their covenant to pay the rent.

As a necessary corollary, defendants' offer to prove that Fisher agreed to go out with the defendants, that pursuant to an arrangement made with him he had no longer any right to continue the occupation, and that they declined to receive rent from him after their own removal, were properly excluded as immaterial. No agreement, understanding, or dealings between them and Fisher could amount to a quitting and surrender of the possession, so long as Fisher remained actually in, and so long as his possession was their possession and not the plaintiffs'.

The views so far expressed render it unnecessary to inquire whether or not the defendants were precluded by their

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refusal to allow the building to be shored up from invoking the benefit of the act of 1860.

The denial of defendants' motion, at the trial, for leave to amend the answer by the insertion of a defense of fraud by plaintiffs in the procurement of defendants' execution of the lease in question, was a matter not only resting in the sound discretion of the court, but perfectly proper under the circumstances. A motion for leave to set up a new and separate defense, and to raise an entirely new issue, the granting of which would operate as a surprise upon the plaintiffs, should never be allowed at the trial.

The judgment and order appealed from should be severally affirmed with costs.

CURTIS and SEDGWICK, *JJ.* concurred.

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N. Y. SUPERIOR COURT.

MARY C. PORTER, executrix of the last will, &c., of GILES W. PORTER, deceased, plaintiff and respondent, agt. ELEAZER PARMLY, defendant and appellant.

A mortgage of personal chattels is a sale on condition. Under it the legal title to the property is vested in the mortgagee, subject to the right of the mortgagor to perform the condition.

Upon breach of the condition of a chattel mortgage, the legal title becomes absolute in the mortgagee, leaving a mere equity in the mortgagor. The mortgagee may thereupon take possession of the property, and so far as the legal rights of the parties are concerned, he may thenceforth treat it as his own. But if he pursues such a course he waives his claim for any deficiency that might otherwise arise.

If the mortgagee, in addition to his legal rights, desires to extinguish the mortgagor's equity, after forfeiture, he must make a fair and *bona fide* sale under the power contained in the mortgage, or have recourse to actual foreclosure of the equity by judicial proceedings.

All legal claim of the mortgagor being gone after forfeiture, he cannot sue for the property, nor sell it, or give another valid mortgage or lien upon it. Nor, after forfeiture, is the mortgagee bound, at law, to receive the amount of the mortgage debt and restore the property to the mortgagor.

While the mortgagor retains possession, before default, he may sell and deliver the property, and the purchaser takes all the interest the mortgagor had thereto, and holds it subject to the mortgage. Such purchaser may again, before default, sell and deliver to another with the like effect, and in such case the remedy of the mortgagee, upon maturity of the mortgage debt, is to follow the property and recover it from the possession of the last purchaser.

If after default, the mortgagor is allowed to remain in possession, he may transfer such possession together with his equity of redemption. That is all the interest he has in the property, and all he can transfer, even to a *bona fide* purchaser for full value. But the mortgagee may, at any time, take the property out of the possession of such *bona fide* purchaser.

Until default in the conditional payment, the mortgagor has such a possessory right for a definite period in the chattels mortgaged against the mortgagee, coupled with the right of redemption, as is liable to levy and sale on execution. In such case the purchaser at the sale on the execution takes the property subject to the due mortgage, and acquires with it, a right to redeem it by payment of the amount on the mortgage.

But after the mortgagee has acquired an absolute title to the property by reason of the mortgagor's default there is not left such a possessory right or interest in the mortgagor as is liable to be sold under an execution against him, and the rule is

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the same though the mortgagor is allowed to remain in possession after the default. In such case his possession is merely by the sufferance and as the bailee of the mortgagee.

The mortgagee's rights as against creditors thus defined, may still become impaired and perhaps lost by a non-compliance with the statutory requirements against fraudulent conveyances and mortgages.

The act of 1833 requiring chattel mortgages to be filed, does not repeal the statute as to fraudulent conveyances (2 R. S., 136), but imposes on the mortgagee, who is willing that the mortgaged property should remain in the possession of the mortgagor, the duty of giving notice of the existence and continuance of his mortgage, by having the same filed and refiled, as provided for in the act.

Whether a *refiling* of the mortgage, as to creditors of the mortgagor is wholly unnecessary after default—*Query?*

But where, as in this case, an actual *change of possession* has taken place, after default, by the mortgagee delivering possession of the property to a partner of the mortgagor (without removal) with the consent of the latter, it cannot be deemed fraudulent against a creditor of the mortgagor, (who knew of the mortgage) whose demand did not become merged into a judgment until after such change of possession, although after the expiration of one year from the filing of the mortgage and no refiled had taken place.

A sale of the property on such judgment and execution set aside, on the ground that the mortgagor had then no interest in the property subject to levy and sale, the title of the property was absolutely vested in the mortgagee.

General Term, March, 1872

Before MONELL, P. J., FREEDMAN and CURTIS, JJ.

APPEAL from judgment entered upon the report of a referee.

The action was brought by Giles W. Porter against the defendant, for the wrongful seizure and sale of personal property, the alleged property of said Porter.

The defendant interposed a general denial.

During the pendency of the action, Giles W. Porter died, and the action was continued by and in the name of Mary C. Porter, acting executrix of the last will and testament of said Giles W. Porter, as plaintiff.

The issues were referred, by consent of parties, to a referee to hear and determine the same, who found the following facts and conclusions of law:

FACTS, *First*. That for some time prior to June 1, 1850, the defendant in this action, was the owner of certain furniture then being in a certain hotel, situated in the city of New York, known as Rathbun's Hotel; such furniture then

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being in the possession of one Benjamin Rathbun and John F. Porter, who were then conducting the business of keeping said hotel as partners, and such furniture being part of the equipment of said hotel and used in conducting said business.

Second. That at some time prior to the 1st day of June, 1850, an agreement was made between the defendant and the said John F. Porter, by which the said defendant sold to said Porter, and the said Porter purchased of said defendant the said furniture above mentioned for the sum of eight thousand seven hundred and fifty-seven dollars and four cents, the said sum to be secured to and to be paid to said defendant by the said Porter, by executing and delivering to said defendant the bond of said Porter conditioned for the payment of said sum on demand, and also by a mortgage on said furniture, to be executed by said Porter to the defendant.

That. That said agreement was carried out on or about the 1st day of June, 1850, by the execution and delivery by said John F. Porter of his bond conditioned for the payment of \$8,757 04, to the defendant on demand, with interest from 1st May, 1850, and by the execution and delivery to the defendant of a mortgage on said furniture, which expressed that it was on condition that the same should be void if said Porter should pay the amount secured by said bond on demand with interest as aforesaid, and also the sum of fifty-five hundred dollars on demand, with interest, which mortgage contained a power of sale in case of default in payment, and a provision that, until default, said Porter was to remain in possession of the property therein described; which said bond and mortgage were respectively dated on June 1st, 1850, and which mortgage was duly filed on the 15th day of June, 1850, in the office of the register of the city and county of New York.

Fourth. That on the same day of the execution of said bond and mortgage, and also some time in the month of April, 1851, the amount mentioned in and secured by said

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bond was demanded of the said Porter, and payment thereof required, and possession of the property described in said mortgage was also demanded, but on neither of said occasions was said amount paid. That on one of said occasions it was agreed between the said defendant and said Porter, that the said Rathbun should be and remain in possession of said property for the defendant—he, the defendant, stating on that occasion, that he would not trust said Porter with the property.

Fifth. That said Benjamin Rathbun and John F. Porter, continued to be partners engaged in carrying on the business of keeping said hotel from the time of the execution of said mortgage up to the time of the sale under said mortgage hereinafter mentioned, and that said property so mortgaged continued to remain in said hotel as the equipment and furniture thereof, and to be used in the carrying on such partnership business during the same period.

Sixth. That the said mortgage was not refiled in the office of the register aforesaid within thirty days next preceding the expiration of one year from the first filing thereof, but was so filed on the 3d day of July, 1851.

Seventh. That on the 2d day of July, 1851, the said John F. Porter, by his statement made, signed, and verified by him, confessed a judgment in favor of Giles W. Porter, assignee of Porter & Ballard, for the sum of \$13,060 82 which statement was filed in the office of the clerk of the city and county of New York, and judgment was entered thereon in the supreme court for said amount on the last mentioned day.

Eighth. That on the second day of July, 1851, an execution against property was issued on said judgment and delivered to the sheriff of the city and county of New York. By virtue of which execution the said sheriff levied upon, and afterwards and on the 21st day of July, 1851, sold at public vendue to the said Giles W. Porter all the right, title and interest which the said John F. Porter had on the 2d day of

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July, 1851, or at any time afterwards, of, in and to all the furniture, goods and chattels on the premises known as Rathbun's Hotel in Broadway, in the city of New York, and all interest in such property, which the said sheriff was authorized to sell, and executed and delivered to said Giles W. Porter, a bill of sale therefor; that the price at which the same was sold was the sum of \$6,000, but that no money was paid on account thereof, said amount, less sheriff's fees, being credited on the execution. That on said sale, said right, title and interest was put up and sold as one lot and not in detached parcels, and that said sale took place in or upon some portion of said hotel, where the property was situated, the same being distributed throughout various rooms in said hotel, in the customary places for use.

Ninth. That before said confession of judgment, said Giles W. Porter knew of the existence of the mortgage hereinbefore mentioned.

Tenth. That the said defendant did, by an instrument in writing endorsed on said mortgage and bearing date the 1st day of July, 1851, make, constitute and appoint Abraham T. Hillyer his true and lawful attorney for him and in his name to take possession of the goods and chattels and property mortgaged and described in said mortgage, and in the inventory thereunto annexed, and to sell the same by virtue of the power of sale therein contained, and to take all proper ways and means to foreclose said mortgage and collect the moneys due thereon, and confirming all he might lawfully do by virtue thereof; and thereupon said mortgage with said instrument indorsed thereon was delivered to said Hillyer. That the said Hillyer, at that time, was one of the deputies of the sheriff of the city and county of New York, and the same who made the sale on the execution hereinbefore mentioned.

Eleventh. That no possession was taken by said Hillyer, under the power indorsed on said mortgage until after the 2d day of July, 1851, but that on some day subsequent

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thereto he did take possession under said mortgage of all the property mentioned in said mortgage then in said hotel, and also did without authority, direction or consent from the defendant, take possession of other property in said hotel not covered by or included in said mortgage, and on the 6th day of August, 1851, he caused all of said property so taken possession of by him to be exposed for sale at public auction, and the said public sale of said property was commenced on that day, and was continued for some days thereafter, until the whole of the said property was sold. That after said sale, said property was removed by the purchasers, and the proceeds were received by said Abraham T. Hillyer. That the defendant did not, in any manner, authorize, direct or ratify the sale by said Hillyer, of any property other than such as was covered by said mortgage.

Twelfth. That the value of the property mentioned in said mortgage and so sold by the said Hillyer, was the sum of eleven thousand and eighty-five 45-100 dollars, and that the interest on said sum from the 15th day of August, 1851, to the date of this, my report, is the sum of fifteen thousand three hundred and forty-one dollars and fifty-two cents (\$15,341. 52).

Thirteenth. That said Giles W. Porter departed this life some time in the year 1859, leaving a last will and testament, which was duly admitted to probate by the surrogate of the proper county, and letters testamentary issued thereon to the plaintiff, the only executor named in said will who qualified.

And from the said facts so found by me, I have arrived at and do hereby report the following as my conclusions of law:

First. That as at the time the said agreement between the defendant and John F. Porter and Benjamin Rathbun in the fourth conclusion of fact mentioned was entered into, the said John F. Porter and Benjamin Rathbun were partners, and as the mortgaged property at that time was used in

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carrying on such partnership business, and as such partnership and such use of said mortgaged property continued after such agreement was made, there was not, in judgment of law, an actual change of possession of the mortgaged property.

Second. That although payment of the amount secured by said mortgage was demanded and refused, yet as there was no change of possession of said mortgaged property, the title to the same was not absolute at law in the defendant after the expiration of one year from the filing thereof as against the creditors of John F. Porter.

Third. That the mortgage executed by the said John F. Porter, to the defendant not having been refiled within the thirty days next preceding the expiration of one year from the time of the original filing, the same ceased to be valid as against the creditors of John F. Porter, and was on the 2d day of July, 1861, void, and of no effect as against Giles W. Porter, assignee of Porter & Ballard, a creditor in whose favor judgment was, on that day, entered against John F. Porter, and execution issued thereon.

Fourth. That although at the time of the sale to Giles F. Porter, upon the execution of said judgment, the said mortgage was valid and subsisting as between the defendant and John F. Porter, and although said sale was expressly made of the right, title and interest of John F. Porter in the property, yet the said Giles W. Porter was not, by reason of his purchase on said sale, estopped from setting up the invalidity of such mortgage as against him.

Fifth. That as the mortgage held by the defendant had ceased to be valid at the time of sale as against Giles W. Porter, he did, by the sale to him of the right title and interest of John F. Porter in the property, acquire the title to and become the absolute owner of the mortgaged property itself, free and clear, and discharged of any lien of the defendant's mortgage.

Sixth. That the sheriff, in making such sale, complied with all the requirements of law in relation to sales of per-

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sonal property on execution, and that the sale of the right, title and interest was properly made in one parcel.

Seventh. That the defendant has no right to object to the manner in which said sale was made, or as to any of the proceedings connected therewith.

Eighth. That the defendant became liable to Giles W. Porter in damages, for the acts of Abraham T. Hillyer, in taking possession of, selling and disposing of the property mentioned in said mortgage, but he did not become liable for his acts, in taking possession, selling or disposing of any property not mentioned in said mortgage.

Ninth. That the measure of damages to be recovered in this action is the value of the property described in said mortgage so sold and disposed of by said Hillyer, with interest thereon from the time of sale.

Tenth. That after the death of Giles W. Porter and the issuing of letters testamentary on the will, the right of action possessed by Giles W. Porter in his lifetime, became vested in the present plaintiff and this action was properly continued in her name.

Eleventh. That the plaintiff in this action is entitled to judgment against the defendant for the sum of eleven thousand and eighty-five 45-100 dollars, with interest thereon, from August 15, 1851, to the date of this report—being the sum of fifteen thousand three hundred and forty-one dollars and fifty-two cents, making in the whole the sum of twenty-six thousand four hundred and twenty-seven dollars and twenty-two cents (\$26,427 22), besides the costs of this action.

Judgment was entered upon said report in favor of the plaintiff against the defendant for \$28,322 23-100, damages and costs, and the defendant appealed from such judgment.

MARSH & WALLIS, *for appellant.*

A. R. DYETT *for respondent.*

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By the court, FREEDMAN, J.—Although the evidence in this case is amply sufficient to sustain the findings of fact made by the learned referee, who tried the cause, I cannot see how, upon the facts as found, his conclusions of law, with the exception of the sixth, seventh and tenth, and the judgment founded thereon, can be upheld.

In *Stoddard agt. Denison*, (2 *Sweeny*, 54), we held that a mortgage of personal chattels is a sale on condition. Under it the legal title to the chattel is vested in the mortgagee, subject to the right of the mortgagor to perform the condition. Until default there is no doubt of the mortgagor's right to perform and, upon performance, to reinvest himself with the legal title.

Upon breach of the condition of a chattel mortgage, valid in its inception, the legal title becomes absolute in the mortgagee leaving a mere equity in the mortgagor. The mortgagee may thereupon take possession of the property, and, so far as the legal rights of the parties are concerned, he may thenceforth treat it as his own, and squander, destroy it or give it away. By pursuing this course, he waives his claim for any deficiency that might otherwise arise.

But, whenever, in addition to his legal rights, the mortgagee desires to extinguish the equity remaining in the mortgagor after forfeiture, then and not until then, must he make a fair and *bona fide* sale under the power contained in the mortgage or have recourse to actual foreclosure of the equity by judicial proceedings.

All legal claim of the mortgagor being gone after forfeiture, he cannot sue for the property, nor sell it, or give another valid mortgage or lien upon it. Nor, after forfeiture, is the mortgagee bound at law to receive the amount of the mortgage debt, and restore the property to the mortgagor (*Charter agt. Stevens*, 3 *Denio*, 33; *Hulsen agt. Walter*, 34 *How.*, 385).

While the mortgagor retains possession, before default, he may sell and deliver the property, and the purchaser takes

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all the interest the mortgagor had thereto, and holds it subject to the mortgage. Such purchaser may again, before default, sell and deliver to another with the like effect, and in such case the remedy of the mortgagee, upon maturity of the mortgage debt, is to follow the property and recover it from the possession of the last purchaser (*Hathaway agt. Brayman*, 42 N. Y., [3 *Hand*,] 322).

If, after default, the mortgagor is allowed to remain in possession, he may transfer such possession together with his equity of redemption. That is all the interest he has in the property, and all he can transfer even to a *bona fide* purchaser for full value. But the mortgagee may, at any time, take the property out of the possession of such *bona fide* purchaser. In case of sale by the mortgagee, to foreclose the equity of redemption, if there be a surplus after paying the mortgage debt, that would belong to the mortgagor or his vendee or assignee. But, after default and until such sale or redemption, the title is in the mortgagee (*Farmers' Bank of Washington Co. agt. Cowan*, 2 *Keyes*, 218).

Until a chattel mortgage becomes an absolute bill of sale by the non-performance of the condition contained therein, the mortgagor usually retains not only the possession, but has such a possessory right for a definite period in the chattels mortgaged, against the mortgagee, coupled with the right of redemption, as is liable to levy and sale on execution. In such case the purchaser, at the sale on execution, takes the property subject to the mortgage, and acquires with it a right to redeem it by payment of the amount due on the mortgage (*Hull agt. Carnley*, 1 *Kern.*, 501; *Hull agt. Carnley, executrix* 17, N. Y., 202; *Goulett agt. Asseler*, 22 N. Y., 225; *Manning agt. Monahan*, 23 N. Y., 539).

But, after the mortgagee has acquired an absolute title to the property, by reason of the mortgagor's default, there is not left such a possessory right or interest in the mortgagor as is liable to be sold under an execution against him (*Baltes agt. Ripp*, 3 *Keyes*, 210), and the rule is the same though

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the mortgagor is allowed to remain in possession after the default. In such case his possession is merely by the sufferance and as the bailee of the mortgagee (*Champlin agt. Grant*, 39 *Barb.*, 606 ; *Stewart agt. Slater*, 6 *Duer*, 99).

These rights of the mortgagee, as defined and laid down, are affected, however, and may become impaired and, in some instances, even wholly lost as against creditors, by reason of the mortgagee's failure to comply with certain statutory requirements enacted for the protection of the creditors of the mortgagor against fraudulent conveyances and mortgages.

Under the act concerning fraudulent conveyances and contracts (2 *R. S.*, 136 ; 3 *Rev. Stat.*, 5th ed., 222), every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, is to be presumed fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchaser in good faith, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned ; and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment, that the same was made in good faith and without any intent to defraud such creditors or purchasers.

The act of 1833, introduced an additional feature into the law, by providing that every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, should be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, be filed as required by said act—such filing in the city of New York, to be in the office

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of the register. The act further provides, that every mortgage filed in pursuance thereof shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof; unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed in the office of the clerk or register aforesaid, of the town or city where the mortgagor shall then reside (*Laws of 1833, chapter 279, §§ 1, 2, 3*).

I agree with the learned referee, that the act last mentioned does not repeal the statute as to fraudulent conveyances above referred to, but imposes on the mortgagee, who is willing that the mortgaged property should remain in the possession of the mortgagor, the duty of giving notice of the existence and continuance of his mortgage, by having the same filed and refiled, as provided for in the act. The object of this act was to create an additional guard against fraud or collusion between the mortgagor and mortgagee, and the presumption of fraud created by the statute, as against a mortgagee of chattels where its execution was not followed by an immediate delivery and an actual and continued change of possession was not in any way affected by the act of 1833.

The filing of a mortgage, does not, of itself, excuse the want of possession of the property mortgaged, but by its means the mortgagee is placed in a position which entitled him to show, as against creditors and subsequent mortgagees and purchasers, that the mortgage was given in good faith, without intent to hinder or defraud creditors.

Such filing is made essential in all cases where there is not an immediate delivery and actual change of possession, and in such cases every mortgage not so filed is declared by the act to be absolutely void against creditors, whose rights,

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in such cases, date from the delivery of the execution to the sheriff, and against subsequent mortgagees or purchasers in good faith (*Hale agt. Sweet*, 40 N. Y., [1 *Hand*], 97).

Now, in the present case, it is fully conceded, that the chattel mortgage was a valid one in its inception, that it was duly filed before the rights of any creditor attached, and that payment of the amount secured by it and possession of the furniture were duly demanded within the first year. But the referee holds that it ceased to be valid as against the plaintiff, representing a creditor of the mortgagor, because not refiled within thirty days next preceding the expiration of one year from the first filing.

That this would be so, in case no default had accrued in the performance of the condition, is too clear for argument. But it seems to me, that it may well be doubted, whether that provision applies after default. As above shown, the title of the mortgagee becomes absolute at law, upon default, not only against the mortgagor but also his creditors, and the mortgage, which has fulfilled its object, is thereupon turned into an absolute bill of sale. The claim, therefore, that such absolute title, once acquired, can be made to cease, by operation of law and without actual fraud, to have any value whatever after the expiration of one year, against the creditors of the mortgagor then existing, appears not only illogical, but unreasonable. Before it can be allowed, the language of the statute must be found to be so clear and imperative as to leave no choice. In *Newell agt. Warren*, (44 N. Y., [5 *Hand*], 244), the commission of appeals held that, under the statute referred to, it was unnecessary to require more than the legislature did, and that consequently a mortgage once refiled at the end of the first year continues valid without further refileing in subsequent years. And in *Hulsen agt. Walter*, (34 *How.*, 385), VAN VORST, J. intimated that a refileing, after default, may in some instances even be improper. He says: A person ignorant that a forfeiture had occurred, and who had acted upon such refileing

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as an acknowledgment on the part of the mortgagee, that his title had not become absolute, might make a claim on that ground.

Now, from the language of the statute, it is by no means clear, that the requirement as to a refiling is intended to apply to a chattel mortgage after forfeiture. The cases of *Ely agt. Carnley*, (19 N. Y., 496), and *Levin agt. Russel*, (42 N. Y., [3 Hand], 251), do not go to the full extent of deciding authoritatively, that it does so apply. In the first case, the mortgage was payable on demand, and no demand had been made at the time of the delivery by the creditor of the execution to the sheriff. Consequently a refiling was absolutely necessary. The additional remark made by the learned justice, who delivered the opinion of the court, that when the title to the property has absolutely vested in the mortgagee, by the mortgagor's failure to perform the condition, a refiling is necessary to preserve the title of the mortgagee, when there has been no change of possession, is merely the expression of a judicial opinion, although entitled, as such, to great respect. And even that is followed up by the further qualification: Once a mortgage, it so continues for the purpose of filing, until the rights of the parties have been changed by some new act or contract in relation to the property. In the second case, more than a year had expired after the filing of plaintiff's mortgage, before he took possession, and no statement exhibiting the interest claimed by him had been filed at the expiration of the first year; but plaintiff took possession before the lien of any creditor attached. Upon these facts it was held by the court (the same learned judge who had delivered the opinion in the case of *Ely agt. Carnley*, 19 N. Y., 496, delivering the opinion in this case), that the omission of the plaintiff to file the statement of his interest in the property covered by the mortgage as required by the statute, to preserve his lien against the creditors of the mortgagor, was obviated by the proofs showing that the plaintiff took possession of the property by virtue of his mort-

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gage in the lifetime of the mortgagor and before the lien of any creditor had attached, and that he retained such possession until the property was taken from him by the defendant.

If this last decision is to be strictly followed, as an authority in all cases which come within the language of it, the following question still remains unanswered, viz.: How can a mortgagee, who has omitted to refile, take possession after the expiration of one year from the original filing, and maintain such possession against the creditors of the mortgagor, who levy upon it the day after he has taken possession, if his mortgage, by reason of non-compliance with the statute, had already ceased, by force of the statute, to have any validity whatever against such creditors?

In *Dillingham agt. Bolt*, (37 N. Y., 198), to which I have been referred, there is no evidence of any default, and the decision made is an authority only upon the point that the removal of the mortgagor from the state within the year, makes compliance with that provision of the statute, which requires the refiling to be made in the office of the clerk of the town where the mortgagor then resides, impossible, and that, upon such contingency, the mortgagee must, as against the creditors and purchasers named in the section, take advantage of his mortgage within the year, or lose the benefit of it as against them.

But as I do not find it necessary to the decision of this case to go to the extent of holding that such refiling is wholly unnecessary, after default, I shall refrain from placing my decision upon that ground. There is an abundance of authority to sustain the proposition that such refiling is unnecessary for the preservation of the mortgagee's rights acquired upon the mortgagor's default, whenever an actual change of possession of the property has taken place, or the rights of the parties have been changed by some new act or contract in relation to the property, which would render a refiling an idle ceremony. That such a change has taken

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place in this case, appears not only in evidence, but is established by the findings of the referee. The testimony shows, and the referee substantially found, as matters of fact, that after the execution of the mortgage, a demand was made on Porter, the mortgagor, for payment of the amount secured by it, and possession of the furniture demanded, that the amount was not paid, and that thereupon, as the mortgagee would not trust Porter with the property Benjamin Rathbun was placed in possession of the property for the mortgagee, with the mortgagor's consent, and that he continued in such possession until the mortgage sale. This worked all the delivery and change of possession of which the property was capable, and was *prima facie*, a compliance with the statute concerning fraudulent conveyances. The mortgagee was not bound to remove it, for, having the absolute title, he had a right to hire it out, with or without compensation. Nor was he bound to make the change more conspicuous by affixing a written or printed notice of his right of ownership to each article of furniture. If the mortgage was valid in its inception and the original condition, whereby the mortgagor was allowed to remain in possession until default, not fraudulent against the mortgagor's creditors, the new arrangement made between the parties upon the occurrence of the default cannot, as matter of law, be deemed fraudulent against a creditor of the mortgagor, whose demand did not become merged into judgment until after the expiration of one year from the filing of the mortgage.

The whole transaction between mortgagor and mortgagee may, in such case, be attacked by such creditor, as seems to have been done in the case of the *Farmers' Bank of Washington County* agt. *Cowan*, (2 *Keyes*, 217, 219), upon the ground that it was entered into or carried out with intent to hinder, delay or defraud the mortgagor's creditors, which is a question of fact.

But as the referee in this case has recognized the good faith of the parties to the original transaction, and failed to

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find, as matter of fact, that such transaction was entered into or carried out with a fraudulent intent, and was for that reason fraudulent against creditors, he was not justified to adjudge as matter of law, that the arrangement entered into between the parties upon default, was fraudulent and void against the original plaintiff in this action, who, it appears, was not mislead thereby, and at the time of the recovery of his judgment had full notice of said mortgage. The mere fact that Rathbun and Porter were copartners, cannot be made to work such a result. It is only one of the many circumstances that may be looked at and considered on the determination of the question of actual fraud.

Upon the proof, and the facts as found, John J. Porter, at the time of the confession of judgment and of the sale on execution, had no interest in the property subject to levy and sale; the title to the property was absolutely vested in the defendant, Parmly; and the sheriff's sale of the right, title and interest of John F. Porter in said property, conveyed nothing to the purchaser.

The judgment must be reversed, the order of reference vacated, and a new trial ordered with costs to the appellant to abide the event.

MONELL and CURTIS, *JJ.* concurred.

Savage agt. The Long Island Ins. Co.,

SUPREME COURT.

EDWARD SAVAGE, testamentary trustee, agt. THE LONG ISLAND INS. CO.

THE SAME agt. THE HOWARD INS. CO.

Where a policy of insurance on real property contained a clause that "if the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance," then the policy shall be void:

Held, that a sale of the property by the assured to a vendee in possession under a lease, with a simultaneous mortgage back for part of the purchase money, did not deprive the assured of an insurable interest in the property and consequently did not avoid the policy. (*Following the case of Hitchcock agt. North Western Ins. Co.*, 26 N. Y., 68).

Where a policy of insurance is issued "to the heirs and representatives of A. K. deceased, M. K., the executrix and trustee of the estate of A. K., took the title and might be considered as described by the words "heirs and representatives" and therefore the assured had an interest in the property insured.

Albany Circuit, January 30, 1872.

LEARNED, J.—The defendants severally issued policies of insurance for \$1,000 each, dated September 19, 1869 (or continued by renewal of that date), to the heirs and representatives of Andrew Kirk, deceased, on a grist-mill and machinery, for one year.

By the will of Andrew Kirk, proved in 1857, Marilla Kirk was made executrix and trustee of all the real estate, with power to collect the rents, to insure, to sell and convey.

By an order of the supreme court, August 29th, 1871, subsequent to the commencement of this action, the present plaintiff was appointed testamentary trustee in the place of Marilla Kirk; and by an order of the surrogate, June 29,

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1871, he was appointed administrator, with the will annexed, in her place.

In February, 1870, Mrs. Marilla Kirk, as such trustee, conveyed the premises to Henry O. Arnold, for the consideration of \$8,000, receiving \$1,000 in cash and a bond and mortgage for \$7,000, the balance of the purchase money.

On the 1st of August, 1870, the mill was destroyed by fire, and it was then worth \$5,000.

The first objection to a recovery is that the policies were issued in the name of the heirs and representatives of Andrew Kirk, and that they had no interest in the property. The title to the real estate was in Mrs. Marilla Kirk, in trust, and she had power to collect rents, and to sell the land and to take back a bond and mortgage for the consideration money, or part of it. I think, therefore, that she may be considered as described by the words "heirs and representatives."

This was an insurance on real estate, and it was evidently issued to the person who had title to the property by the will of, or descent from, Andrew Kirk (*Clinton agt. Hope Ins. Co.*, 51 Barb., 647).

The second objection presents greater difficulty.

Each policy contains a clause that "if the property be sold or transferred, or any change takes place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance," then the policy shall be void. It is insisted by the defendants that the sale to Arnold made the policy void. It appears that Arnold had been in possession previously under a lease, so that the question as to a change of actual possession does not arise. It is insisted by the plaintiff, that as the sale was accompanied by an immediate mortgaging of the property to the vendor to secure part of the purchase money, the vendor had still an insurable interest, and the transaction did not avoid the policy.

In the case of *Hitchcock agt. North Western Ins. Co.*, (26 N. Y., 68), an action was brought on a marine policy which contained a clause that in case of the transfer of any interest

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of the assured in the property, either by sale or otherwise, the policy should be void. The owners sold the vessel and took a conveyance by way of mortgage for a part of the purchase money. It was held that the owners were entitled to recover. It is said in that case that, in order to make void the policy, the transfer must be a transfer of the whole insurable interest of the assured in the property. The differences between that case and the present, are only two; one is that that was the case of a marine, this of a fire insurance; the other is, that in this case the language of the condition is, "if any change takes place in the title." As to the former, the argument of the court is not put upon any peculiarity in a marine policy. As to the latter, the policy in the case cited was to be void in case of transfer of any interest of the assured in the property insured. The insured was a general owner, and the transfer, which was held not to make void the policy, was a sale of the property accompanied by a reconveyance by way of mortgage. That was a change in the title, and the court say, in construing this condition, that "any change of the title which does not deprive the assured of insurable interest, does not" make void the policy. I cannot see that the expression "if any change takes place in the title" means anything different from the expression "in case of the transfer of any interest of the assured in the property." The decision above cited seems to me, therefore, to control the present case.

In the case of *Springfield M. & F. Co. agt. Allen*, (43 N. Y., 389), to which the defendants refer, the facts, so far as they bear on the present question, were; that the owner of the property, after the policy was issued to him, conveyed the premises absolutely, not taking back any mortgage for the purchase money. It was held that such a conveyance avoided the policy, although the owner, being personally liable on a debt secured on the premises by a pre-existing mortgage, still had, in that respect, an insurable interest in the premises. It was not disputed in that case that the

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owner, by his conveyance, had parted with all title, legal or equitable, to the property insured. In this respect, that case differs from the present, and from the case of *Hitchcock agt. North Western Ins. Co.* In the present case, the owner, simultaneously with her conveyance, took back a purchase money bond and mortgage to the extent of seven-eighths of the value of the property.

I understand the case in 26 N. Y., 68, to decide that a sale of property, with a simultaneous mortgage back for part of the purchase money, is not a transfer of an interest of the assured in the property, within the meaning of the conditions of a policy of insurance.

If I am correct in my understanding of that decision, it is unnecessary to examine other authorities or to consider the question on principle. I shall simply follow that decision and hold that the plaintiff is entitled to recover.

Crozier agt. The Boston, N. Y. & Newport Steamboat Co.

SUPREME COURT.

HIRAM P. CROZIER, agt. THE BOSTON, NEW YORK AND
NEWPORT STEAMBOAT COMPANY, appellant.

A steamboat company is liable, as a common carrier, for the loss of baggage of a passenger stolen or robbed in the night time from the state room occupied by him, if the passenger has paid, there being no negligence on his part; although the baggage is such as the passenger may choose to retain upon his person or in his own custody—such as a pocket book, money, watch and chain, &c.

The rule requiring such baggage to be specially delivered into the custody of an officer of the boat, in pursuance of a printed notice posted up, is inapplicable to a passenger occupying a state room on a steamboat.

Kings County, General Term, May, 1871.

THIS action was tried before James C. Carter, Esq., referee, in New York, and judgment rendered for the plaintiff. The defendant appealed.

I. T. WILLIAMS, *for appellant.*

T. C. CRONIN, *for respondent.*

The following is the opinion of the referee.

J. C. CARTER, *Referee.*—It appears that on the 27th of June, 1868, the plaintiff, with his wife, was a passenger upon the steamer *Old Colony*, belonging to the defendants, on her trip from Newport. He purchased and paid in the usual way for tickets, and also took and paid for a state room. He retired at night and in the morning found that his room had been entered and his watch and chain and pocket book together with his wife's veil stolen. This action is brought to recover the damages thus sustained.

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It is urged, by way of defense, that if the action is to be regarded as founded upon the liability of the defendants as common carriers, to carry safely and deliver the baggage of the plaintiff, it must fail, for the reason that there was no delivery of the articles lost into the custody of the defendants, and that, consequently, no liability was ever imposed upon them in respect to the articles in question; and, in support of this view, I am referred by the defendants' counsel to the well established limitation of the liability of a common carrier, which exempts him from responsibility in respect of baggage or other property which the passenger may choose to retain upon his person, or in his own custody. Undoubtedly the common carrier should generally be permitted to have the custody of all property for the safety of which he is chargeable; and if a passenger by any public conveyance, such as a stage, railroad car or steamboat, chooses to retain any portion of his baggage or money about his person, it is equivalent to a declaration on his part that he will take the responsibility upon himself, and if he is robbed of it in broad daylight he has no one to blame but himself.

I think, however, that the case of a passenger occupying a state room on a steamboat is totally different, and that the rule referred to is quite inapplicable to it. In such a case, the passenger is invited, upon the payment of a consideration, to disrobe himself and retire to a couch to sleep; in other words, he is invited to throw aside all the vigilance and precaution which men habitually practice when awake, and to entrust his person, and whatever men usually carry about their persons, to the care and vigilance which, it must be presumed, they who extend the invitation and receive the reward for the comfort thus afforded, will themselves exercise. Certainly, few persons would dare trust themselves to sleep in a state room on board a steamboat unless they supposed those in charge of it were under an obligation to exercise the utmost vigilance. If it were supposed that thieves and robbers were at liberty to ply their vocation at night in such

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a place, and that those who alone had the power to furnish protection against them, were under no obligation to furnish it, slumber would be unknown, unless the sleeper had taken the precaution to hire a special watchman. Nor can it be in the contemplation of either carrier or passenger that the latter, should make a special deposit of his pocket-money or articles usually carried about the person before retiring to rest. As well might we suppose that it was in contemplation that the passenger should deliver the clothes he takes off unto the special custody of the carrier. Nothing like this was, in my judgment, contemplated by the printed notice which was proved to have been posted in the state rooms.

It seems to me, that when in such cases the passenger retires to his room, takes the precautions, in the way of latching and bolting the doors and windows, which it is intended by the provision made therefor that he should take, divests himself of such portions of his clothing as comfort may suggest, and retires to rest, the situation is precisely what is contemplated by both parties; and I perceive in it all the elements of that form of liability which, under circumstances quite analagous, attaches to an innkeeper.

The rule of law applicable to such a case, I think to be this: that if any of the articles or money which the passenger properly has with him in the state room, is stolen, the presumption is, that the theft was in consequence of the default of the carrier; and that this presumption can be repelled only by proof that the loss was attributable to the negligence or fraud of the passenger, or to the act of God, or of the public enemy (*Hulett agt. Swift*, 33 N. Y., 571). All the considerations of public policy which have operated to fix upon innkeepers the rigorous liability above indicated apply, as it seems to me, with increased force to the case of carriers of passengers under these circumstances.

If the foregoing views are correct, it follows that the defendants are liable, unless they can show some negligence or fraud on the part of the plaintiff, or some modification of

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the rights or duties of the parties by virtue of some special agreement.

The effort was made to show that the affixing of the notices in the state room and elsewhere, was proof of such a modification, but I understand it to be well settled that mere proof of such posting of notices, without more, leave the common law liability unaffected.

It appeared, by the plaintiff's testimony, that the provision of locks and bolts on the state room door was imperfect, the lock being in such a condition that it would barely catch, and the separate bolt not capable of being passed into the socket, and that these defects were observed by the plaintiff on entering the room. It is urged that it was negligence on his part not to communicate information of these defects to the officers of the boat. If the plaintiff had discovered defects about the fastenings which seemed to have been recently occasioned, so as to suggest a question as to whether the carrier had had a fair opportunity to discover them, I should certainly hesitate before coming to the conclusion that he was not bound to call attention to them; but I do not think, that he was bound to summon the officers of the boat to examine partial defects like those in question, which might well have existed for a long time.

Some evidence was introduced by the defendants, for the purpose of contradicting the testimony of the plaintiff touching the defects in the fastenings; but it was quite too indefinite to be allowed any weight; nor do I think, that the plaintiff's case requires affirmative proof of negligence. It is enough for him to show the loss, and the carrier is presumptively responsible; and this presumption against the carrier cannot be repelled by proof that he exercised care and caution, however great; he must go further, and show negligence on the part of the passenger.

I observe, that the complaint apparently proceeds upon the view that negligence on the part of the carrier is to be affirmatively shown as a part of the plaintiff's case; and I

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think, the allegation in that respect is sustained by the proof; but I do not think, that the plaintiff was bound to take that burden upon him.

I must, therefore, report in favor of the plaintiff for the damages sustained by the loss of watch and chain and money. It was not proved that the vail was his property, and presumptively it belonged to his wife.

The judgment was affirmed at general term, and the appellant acquiesced in the law of the case and paid the judgment.

U. S. DISTRICT COURT.

In the matter of LOUIS ROSEY, bankrupt.

While a suit was pending against a party, and after the testimony was all in and the case submitted to the referee for decision, but before any decision is made, the party was declared a bankrupt. Soon after such bankruptcy, the referee decides the case in favor of the bankrupt, an application is now made to the register in charge to order the assignee of the bankrupt to pay the fees of the referee which have been incurred during the reference.

Application reported against by the register and acquiesced in by the parties.

It seems that it would be competent for the assignee to take up the report, at the expense of paying the fees of the referee, in case he should, in the exercise of a sound judgment, think it necessary in order to protect the estate from a renewal of the claim in question.

Southern District of New York.

AT chambers, 4 Warren street, in the city of New York, in said district, on this 3d day of January, 1872.

I, the undersigned register to whom it was referred, by the order of this court bearing date November 25th, 1871, to inquire on proofs and report whether Anthony Oechs, Esq., the assignee of the estate of the said bankrupt, ought to be authorized to pay Henry Nicol, Esq., the sum of \$350 out of the funds belonging to the estate of the said bankrupt, for his fees as referee in an action, wherein Clarissa Davenport is plaintiff and the said bankrupt is defendant, now pending in the superior court of the city of New York, upon the execution by the said bankrupt of an assignment of his claim against the said Davenport for said referee's fees as a disbursement in the suit, and upon a stipulation executed by John B. Fogarty, Esq., the attorney for the said Rosey in the said action, to repay to the said assignee the said sum of \$350 out of the first moneys paid by the plaintiff in said action, or

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anyone in his behalf on account of the costs or disbursements in said suit, do hereby certify, that I have been attended by counsel for the said petitioner, the said assignee though duly notified not appearing, and that I have taken the proofs herewith submitted.

That it appears from said testimony, that the suit in question was commenced in January, 1868, and was referred to said referee in November, 1869. That testimony was taken from time to time before said referee up to August, 1871, when the same was submitted to said referee for decision.

That in the early part of November, 1871, the said referee gave notice that he had decided said action in favor of the defendant therein. The petition in bankruptcy was filed on the 14th day of August, 1871, and the assignee was confirmed on the 22d day of September, 1871.

There is nothing in the testimony that would indicate that the assignee has in any manner participated in or interfered with the case. Nor is it proven that any part of the services of the referee were rendered after the commencement of the proceedings in bankruptcy.

I don't see, therefore, how the assignee has rendered himself liable, as such assignee, for the claim in question.

It is clear that no sum can be paid in full out of the fund unless it be either a preferred debt or a debt incurred by the assignee in his official capacity for the benefit of the estate. No doubt, the court would imply a promise on the part of the assignee, to pay for beneficial services rendered to the estate after the commencement of the proceedings in bankruptcy, in case he should participate in the benefit of such services. But I don't see that the present case, can be brought within that category. The claim of the referee rests in contract between himself and the parties before him. The plaintiff in that action is no less liable for the fees of the referee than if the case had been decided in her favor, nor is the defendant any more liable than if the case had gone against him. It is a debt of the defendant in that action,

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which, now that he is a bankrupt, may be proved against him in bankruptcy.

The receipt of a dividend in bankruptcy will not affect the validity of the claim of the referee upon the plaintiff in that action, for the balance due him, nor will it in anywise invalidate his lien upon any judgment that may be entered therefor.

I, therefore, recommend that an order be entered denying the prayer of the said petition, Respectfully submitted,

I. T. WILLIAMS, *Register in Bankruptcy.*

Supplementary.

At chambers, 4 Warren street, in the city of New York, in said district this 19th day of January, 1872.

I, the undersigned register in charge of the above entitled matter, do hereby certify, that since writing the foregoing certificate, I have been attended by counsel for the said petitioner, and have, at his request taken additional testimony which is herewith submitted, and have listened to further argument of said counsel upon said matter. That I am unable to see that the said additional testimony should change the conclusions to which I arrived in that certificate.

The argument, that the services of the referee redound to the benefit of the estate, in that, the report, if taken up by the assignee, for the purpose of docketing judgment against the plaintiff in that action, and thereby defeating any claim she may prove in bankruptcy arising out of the matter so in suit before said referee, would, no doubt be valid in case any necessity should arise for so doing. It would, perhaps, cost less to obtain the report by a payment of the fees due the referee and docket judgment, than it would cost to defeat the plaintiff's claim (should she prove it in bankruptcy) by evidence to be taken anew for that purpose before the register.

Without expressing any opinion as to what is or may become the duty of the assignee in that regard, it is, perhaps,

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enough to say, that should he think it necessary to take up that report, and should ask upon the final passing of his accounts, to be allowed the sum he should so have paid, perhaps no creditor ought, and probably no creditor would, question the soundness of his discretion in adopting that course. The assignee is bound to nothing more than the best exercise of his judgment in the premises, and having exercised that, the creditors have only to blame themselves for electing him, should they think his judgment defective. Respectfully submitted,

I. T. WILLIAMS, *Register in Bankruptcy.*

Cornwell agt. Wooley.

COURT OF APPEALS.

CHARLES CORNWELL, respondent, agt. MATILDA D. WOOLEY,
executrix, &c., appellant.

It has long been the settled law of this state, that the execution of a will may be proved on a trial at law, by *one witness*, if he is able to prove its perfect execution. Where one of two subscribing witnesses to the execution of a will resides out of the state, and due proof of its execution is made by the other witness, a devise made in the will to the non-resident witness is not void under the statute.

March Term, 1867.

THIS action is brought by the plaintiff as assignee of Joel Parker, to recover a legacy of \$500, together with one fifty-fourth part of the residuary estate, under the will of the late Isaac M. Wooley, of the city of New York, amounting to \$1,248. Joel Parker, the legatee and devisee, was one of the witnesses to the will, and at the time of the death of the testator, and ever since, was a resident of the state of New Jersey. The other witness to the will was examined before the surrogate, and the testimony of Mr. Parker was also taken on the question of the execution of the will. The defense is based upon the claim that the legacy to Parker, and all his interests under the will, are void on the ground that he was one of the two only subscribing witnesses to the will. The judge at the special term, and the general term of the second district, held otherwise, and gave judgment for the plaintiff. The defendant appeals to this court.

Mr. RIGGS, *for appellant.*

Mr. FULLER, *for respondent.*

HUNT, J.—The statute upon this subject is as follows:

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"If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate, shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, &c., shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made" (2 R. S., 65, § 50). The provisions of the statute respecting the execution of a will are as follows: "Every last will and testament shall be executed and attested in the following manner: 1. It shall be subscribed by the testator at the end of the will; 2. Such subscription shall be made in the presence of attending witnesses, &c.; 3. The testator shall make certain declarations; 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator" (2 R. S., 63, § 40). There being but two witnesses to the will, including the legatee, it is manifest that his name is indispensable to the due execution thereof. The statute which regulates the proof of wills, bearing upon the present point, is as follows: "When any one or more of the subscribing witnesses to such will shall be examined, and the other witnesses are dead, or reside out of the state, or are insane, then such proof shall be taken of the handwriting of the testator, and of the witness or witnesses so dead, absent, or insane, and of such other circumstances as would be sufficient to prove such will on a trial at law" (2 R. S., 58, § 13). "If it shall appear upon the proof taken, that such will was duly executed; that the testator at the time of executing the same was in all respects competent to devise real estate; and not under restraint, the said will and the proofs and examinations so taken shall be recorded in a book to be provided by the surrogate, and the record thereof shall be signed and certified by him" (§ 14). "Other sections provide that the record of

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the same shall be competent evidence in all the courts of the state.

It has long been the settled law of this state, that the execution of a will may be proved on a trial of law by one witness, if he is able to prove its perfect execution (*Jackson agt. Vickory*, 1 *Wend.*, 416). It is manifest that it is not indispensable in all cases that both the subscribing witnesses to the execution of a will should appear before the surrogate to establish its execution; as when one of the witnesses is dead, or resides out of the state, or is insane. In such cases, the will may be established before the surrogate "without the testimony of such witness," and by the testimony of the remaining witness. In the present case, Parker was a non-resident of the state, and was within the exceptions mentioned. If the remaining witness was competent to prove the complete execution of the will, that is, its subscription and acknowledgment by the testator, and its attestation by the two witnesses in his presence, and at his request, the will was sufficiently proven under the statute. No objection was made on this ground, and upon an examination the evidence of the remaining witness has been full and complete.

The appellant claims that the expression, "without the testimony of such witness," should not be confined to the remaining witness or giving evidence by such subscribing witness, in the ordinary sense of those words, but was intended to include all evidence that such person was a witness or took any part in the transaction. The expression in section 13, which I have quoted, that proof should be taken of the handwriting of the witness, of the testator, and of other circumstances sufficient to prove the will on a trial at law, and the necessary evidence on such trial of law, rebut this idea.

The will could have been proved without the testimony of Parker. The devise to him does not, therefore, become void, and the present action is well brought. The judgment below should be affirmed.

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SCRUGHAM, *J.*—The plaintiff's assignor, Joel Parker, was one of the witnesses to the will, and resided out of the state at the time it was proved. On the examination before the surrogate of the other subscribing witness, Robert Keon, he testified to all of the facts necessary to constitute the execution of the will, as that the subscription to the will was made by the testator in the presence of the witnesses; that at the time of making it he declared the instrument to be his will; that he requested each of the witnesses to sign it as such, and that each of them so signed it in the presence of the testator. As Mr. Parker resided out of the state, this examination of Mr. Keon having been had, no other testimony was necessary to the proof of the will, except proof of the handwriting of the testator, and of the non-resident witness, Joel Parker (2 *R. S.*, 58, § 13); and, therefore, as the will could have been proved without the testimony of Joel Parker, the legacy to him is not void (2 *R. S.*, 65, § 50; *Caw agt. Robertson*, 1 *Seld.*, 125).

The judgment should be affirmed.

Affirmed.

Lee agt. Decker.

COURT OF APPEALS.

ALFRED LEE, respondent, agt. SIMON DECKER, appellant.

Where a contract, including a settlement of all accounts, is reduced to writing and signed by the parties, it merges all previous contracts, understandings, or expectations upon the subject.

And where the testimony of one of the parties to such contract is in accordance with the writing, it will prevail over the contradicting testimony of the other party.

March Term, 1867.

THIS was an action brought by Lee, as assignee of one Shannon, to recover the sum of \$800 upon the following contract:

“April 1, 1859.

“Settled all accounts up to this date, and found due S. Decker, six hundred dollars on the purchase of a house and lot, this day deeded to Hiram Decker for \$1,400, leaving due to H. Shannon eight hundred dollars from S. Decker; the said Decker to sell and have the full proceeds of said house and lot, and any demands that said Decker shall purchase against Shannon to be deducted from the eight hundred dollars due Shannon from Decker. This arrangement is left so that it may be arranged as to payments after the consummation of a contract to be made with F. Bronson. H. SHANNON, SIMON DECKER.”

After hearing the evidence of both the parties to the contract, the court directed the jury to find a verdict in favor of the plaintiff. The general term of the sixth district affirmed the judgment entered upon the verdict, and the defendant now appeals to this court.

A. J. PARKER, *for appellant.*

F. KERNAN, *for respondent.*

HUNT, J.—The contract of April 1, 1859, when reduced to

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writing, and signed by the parties, merged all previous contracts, understandings, or expectations upon the subject. By that contract it was expressly agreed that Decker owed Shannon eight hundred dollars. The price of the house and lot was fixed at \$1,400; and \$600 found due to Decker was deducted from the amount of the purchase money, leaving the amount due to Shannon as above stated. There is no obscurity in the portion of the contract in which these stipulations are contained.

Shannon testified that Decker had bought the house of him, and had sold or expected to sell it to one Bronson; and the dates of the payments to be made to him (Shannon) were to be arranged after the contract with Bronson should be completed. Decker, on the other hand, testified that he had not purchased the house of Shannon, but that Bronson had purchased direct from Shannon, and that nothing was to be paid to Shannon until \$600 had first been paid to him by Bronson. The testimony of Shannon is in accordance with the writing, and furnished a reasonable explanation of the meaning of the last clause thereof. That of Decker is in contradiction of the plain terms of the writing, and, therefore, of no effect.

The defendant claims that, in any event, he cannot be compelled to pay until it appears, by proof, that a contract had been made with Bronson, and payments had matured under the same. This is answered by the uncontradicted evidence of Shannon, that he repeatedly called on the defendant, requesting him to pay the amount due, or to give his notes at long periods, or to make some arrangement, and that the defendant absolutely refused to pay, to make any arrangement, or to do anything whatever about it, at present, or in the future. He refused to recognize the agreement, or to have anything to do with it. This repudiation justifies an immediate action for the recovery of the money admitted by the contract to be due at some time (*Hanna agt. Mills*, 21 *Wend.*, 90, 92, and cases there cited).

The judgment should be affirmed.

All concur. Affirmed.

Town of Middletown agt. The Rondout & Oswego R.R. Co.

SUPREME COURT.

THE TOWN OF MIDDLETOWN in behalf of itself and all other Stockholders of the Rondout and Oswego Railroad Co. agt. THE RONDOUT AND OSWEGO RAILROAD CO., JOHN C. BROADHEAD, and others.

THE SAME agt. THE SAME.

A county judge has no power or jurisdiction, on granting an injunction *ex parte*, to grant an order to *show cause*, returnable *before himself*, why such injunction should not be continued. (*Affirming S. O., at special term, ante. p. 144.*) PARKER, J., *dissenting*.

Where an application for an injunction is denied upon two legal propositions stated by the judge, (which are erroneous,) when it should have been denied upon the facts, instead of the law, the order of denial will not be reversed on appeal, as the judge below arrived at the correct conclusion, though for the wrong reason.

Where separate attorneys appear on a motion, for different parties, in the same action, the costs of but *one motion*, \$10, can be allowed.

Third Department.

Before POTTER, PARKER and DANIELS, JJ.

THESE are different appeals taken from orders made in the same case at different special terms, one from the third, the other from the sixth judicial district, and may be considered together. They involve different questions of practice, but originated in the attempt to secure the same object, to wit, to obtain an injunction against the acts or threatened acts of the defendants. The first is an appeal from an order at special term in the third district, dissolving an injunction granted by a county judge. The second is an appeal from an order at special term in the sixth district, to grant an injunction. The plaintiffs appeal from both orders.

The action was brought by the town of Middletown which,

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under what is called the bonding act; is a stockholder in the Rondout & Oswego Railroad Company; and they sue in behalf of themselves and all other stockholders in said railroad company, and they allege that they bring the action by direction of the commissioners of said town who were duly appointed by the county judge under the statute in that year, to issue bonds and take stock.

The main object of the action is to restrain the railroad company from entering into a contract with the defendants Green & Satterlee, for the construction of the incompleeted portion of the road, and to pay or compensate said contractors therefor by giving them the earnings or income of the said road for a period of years, but they also ask, that said contract be annulled, all other material facts will sufficiently appear in the opinion.

T. R. WESTBROOK, *for plaintiffs.*

A. SHOONMAKER, Jr., and S. HAND, *for the Railroad Co.*

BELL, BARTLETT and WILSON, *for the defendants Green & Satterlee.*

POTTER, J.—The plaintiff obtained an injunction from the county judge of the county of Ulster, the county in which the venue was laid which was in the following form:

“Sufficient cause appearing therefor by the complaint in this action, only verified and by the affidavits of Thomas Cornell and Theodorice R. Westbrook, you and each of you, and your and each of your attorneys, agents and servants and confederates are enjoined and restrained from making, executing or consummating or carrying into effect, or attempting to do so, a lease or sale upon my terms whatever of the Rondout & Oswego Railroad, its property and franchises, or any part thereof, or any interest therein to the defendants, John A. Green and John Satterlee, or either of them, or to any person or persons whomsoever, until the further order

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of the court in the premises, and you are further required to show cause before me at my office in the village of Rondout, on the 14th day of February, 1872, at 10 o'clock A. M. why this order should not be continued. Dated, Rondout, February 5, 1872."

On the 9th day of February, then instant, the defendants, Green & Satterlee obtained from a justice of the supreme court in New York, an order in the same case of which the following is a copy :

"On the summons, complaint, affidavits, injunction, and all the papers heretofore served in this action, and on the affidavit of Edward T. Bartlett hereto annexed, let the plaintiffs or their attorneys show cause before a justice of this court at a special term thereof to be held at the city hall in the city of Albany, county of Albany, on Tuesday the 27th day of February, 1872, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the complaint in this action should not be set aside as irregular, in that it does not contain the title of the cause specifying the name of the court in which the action is brought, the name of county in which the plaintiffs desire, the trial to be had, or the names of parties to the action, plaintiffs and defendants nor any or either of said facts. Also show cause why the moving defendants, John A. Green and John Satterlee should not have such other or further relief as to the court may seem just, together with the costs of this motion.

"And it is further ordered, that until the hearing and determination of this motion, all proceedings on the part of the plaintiffs be stayed not exceeding twenty days, and the moving defendants to have ten days after the determination of this motion, if the same be denied to answer the complaint herein. Dated February 9th 1872." At this date the plaintiff's complaint had not been served. At a subsequent day (February 15th) the justice who granted the last above order so modified it, on an application of the plaintiff's attorneys,

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as to allow the plaintiffs to serve their complaint, and it was accordingly served.

On the 12th of February, then instant, the attorneys of the railroad company applied at special term of the supreme court in the third judicial district, and obtained an order of which the following is a copy.

"On the summons, complaint, affidavit, injunction, and all the papers heretofore served in this action, and on an affidavit of Augustus Schoonmaker, Jr., herein, a copy whereof is herewith served, let the plaintiff in this action show cause at a special term of this court, appointed to be held at the city hall in the city of Albany, on Tuesday the 27th day of February, 1872, at the opening of the court on that day, or as soon thereafter as counsel can be heard, why the complaint served in this action should not be set aside as irregular in that it does not contain the title of the cause specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, or the names of the parties to the action, plaintiffs and defendants, nor any nor either of said facts, with costs of this motion. Also show cause why the moving defendants herein should not have such other or further order or relief as to the court may seem just. And it is further ordered, that until the hearing and determination of this motion, all proceedings on the part of the plaintiff (except a postponement of the motion for injunction) be stayed, not exceeding twenty days, and the moving defendants herein to have ten days after the determination of this motion if the same be desired to answer, or demur to the complaint herein."

On the 27th February, 1872, at the special term of the supreme court held at Albany, on that day a motion was made upon hearing of all the parties, when it was ordered, that the injunction order made by the judge of Ulster county, on the 5th February, 1872, be and the same hereby is set aside with ten dollars costs of motion, to be paid by the plaintiffs to the defendants appearing by Schoonmaker and

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Hardenburgh as attorneys, and also ten dollars costs of motion to be paid by the plaintiff to the defendants appearing by Bell, Bartlett and Wilson as attorneys, and this order is made on the ground that the county judge had no power or jurisdiction to make the order granted by him."

This is the first order appealed from before us for review.

After the decision of this motion and the making of this order, the plaintiffs applied upon the same, and some additional papers to a judge of the supreme court of the sixth judicial district, on the 11th March, 1872, and obtained an order for the defendants to show cause before the same judge on the 15th day of March, then instant, why they should not be enjoined from consummating the same contract, or attempting to do so. On the day appointed the parties all appeared, and were fully heard before the said judge, who after reciting the facts, held as follows:

"I do hereby order that the motion for an injunction in this action restraining the defendants as specified in said order to show cause, be and the same hereby is denied, and that the plaintiff pay to the defendants ten dollars costs of this motion. And it is further ordered that the order restraining the defendants until the return day of said order to show cause be and hereby is vacated.

It is held, that the railroad company has no power to lease its roads to individuals, to be operated by them without the supervision or control of the company, that the contract entered into was such lease, but the action cannot be brought by the railroad commissioners in the name of the town. It should be brought by the supervisor. For this reason, this application for injunction is denied.

This is the second order appealed from.

There were several questions of pretty sharp practice between the attorneys appearing, upon papers which were somewhat discussed on the argument, but which, cannot be reviewed on these appeals. The decision of neither of the motions were made or controlled on that ground. The two

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orders in question, must be separately examined. And I think, if the orders are right in the result, they should be affirmed, even if the decisions were placed upon erroneous grounds.

Order 1st :

1. Had the county judge power to make the order that was so set aside ?

The power of the county judge is obtained from the 218 and 219th sections of the Code. The order granted by him was an absolute order unlimited in its effects as to time, except in law, it was subject to the power of the court to make a further order therein. It also, as a part of the order, in terms, directed the defendants to show cause before the said county judge on the day named, why the order should not be continued. This branch of the order he had no power to make (*Parmenter agt. Roth*, 9 *Abb. N. S.*, 392; *Rogers agt. McElhone*, 20 *How.*, 441; *Merrill agt. Slocum*, 3 *How.*, 309).

An order to show cause is equivalent to a notice of motion, and such a motion in a cause pending in the supreme court, cannot be heard before a county judge. This part of the order, then, of the county judge was void. The 94th rule of the supreme court could not enlarge the statute powers of the county judge.

The order obtained in New York which stayed the proceedings, and prevented the parties appearing before the county judge on the day, to show cause, did not affect this clause of the order, it being void. If the other part of the order remained in force, it then became the more objectionable in that it became a permanent and continuing order of injunction, granted upon the merits of the case, before the service of the complaint or answer. Was the whole order then a nullity, by reason of its omission to comply with the 94th rule of the supreme court, which requires that it contain an order to show cause within ten days, why such order should not be continued ?

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The 94th rule allows such an order to be made only when made in connection with the additional order, to show cause before a proper forum possessing the power upon a motion, to continue it, to dissolve or set it aside (*Parmenter agt. Roth*, 9 *Abb. N. S.*, 392).

An order to that effect void in itself, is precisely as if no order had been made. By virtue of section 470 of the Code, this 94th rule is the law of the courts. The court that should declare such an order void, would be only acting consistent with duty, and we should, therefore, sustain its decision. But there is, I think, another reason in law why the special term should have declared this order to be void. It is within the spirit of section 223 of the Code, and rule 94 of this court, that injunction orders granted *ex parte* are not intended to have legal effect for a longer period than ten days. The case of *Harold agt. Hefferman* (42 *How.*, 242), holds, to the same view. More than ten days had elapsed from the date of the county judge's order, before it was reversed or set aside at special term. If its force had ceased, the declaring it void was harmless. The order then made and appealed from, only had the effect to put the question at rest from further litigation or controversy. I am also inclined to think, from an examination of the case upon the merits, looking at the claimed equities as set forth in the complaint, which are mostly, upon information and belief, and that the denials made by the parties defendants who speak from more positive and better knowledge; that the injunction should have been dissolved for this reason, had there been no other legal objection to it. Most of the substantive allegations are upon information and belief. These, without denials, are not sufficient to sustain an injunction (*Campbell agt. Morrison*, 7 *Paige*, 157, 160; *Bank of Orleans agt. Skinner*, 9 *Paige*, 305-6; *Jewitt agt. Allen*, 3 *How.*, 129; *Williams agt. Lockwood, Clarke, Ch.*, 172). But all the material equities are not by denials. For this reason, it should have been dissolved (*Hoffman agt. Livingston*, 1

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Johns. Ch., 211; 18 *How.*, 158, 186). Besides the granting or continuing an injunction before final hearing generally depends upon the discretion of the court, and is governed by the nature and circumstances of the case (*Robert agt. Anderson*, 2 *Johns. Ch.*, 202). I do not deem it necessary to discuss the question of the weight of evidence upon each of the charges made upon the papers at length. If the injunction should have been dissolved instead of being set aside, the order will not be reversed on account of the form of the order. The court did what they should have done in another form. If we are right in the views above expressed, it is not necessary to discuss the other questions in the case under this point. The result of the decision is right.

Second order:

The learned judge who denied the motion for the injunction upon an order to show cause, and upon hearing of all parties, laid down in his order four distinct propositions, two of which were in favor of the views of the plaintiff, viz.:

First. "That the railroad company has no power to lease its road to individuals to be operated by them, without the supervision or control of the company."

This is a compound legal proposition in favor of the plaintiff's view, whether sound or not, as there is no appeal from it, will only be necessary to discuss if the third and fourth propositions are erroneous.

Second. "That the contract entered into was such lease." This is also, a proposition in favor of plaintiffs, whether it was such lease, there being no appeal from it, like the first proposition, it is not now necessary to discuss.

Third. "The action cannot be brought by the railroad commissioners in the name of the town", and

Fourth. "It should be brought by the supervisors."

On these two last propositions, which may be considered as one, the application for the injunction was denied. And for this the appeal is brought.

This motion was made upon additional papers to these

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used on the preceding one, and it was also resisted upon fuller explanations and denials. After a careful examination of the case, I do not think, the application upon the whole papers was made stronger, than at first, on the part of the plaintiff, and had the judge denied it upon the facts instead of the law, it would have been right by every rule of practice in equity known as to granting, sustaining and dissolving injunctions. The motion should have been denied on this ground. I think, therefore, that the judge arrived at the correct conclusion on the motion, though for a wrong reason, as to the legal propositions.

I think it will hardly be contended at this day, that corporations can perform no act and can make no contract but such as the statute in express language authorizes. The contrary is true. They being invested with the powers of natural persons for the purposes specified, they, to a certain extent, may enter into any contract to carry out that object which is not in violation of some public law, or contrary to public policy. Subject, as other trustees are, to being called to account for acts which are greatly prejudicial, unjust, or fraudulent towards stockholders, or parties interested. The contract complained of in this case was one purporting to be for the purpose of constructing and furnishing the railroad of the corporation. This was the very object of their creation. This was a purpose expressly authorized by the statute. To do this, even if it was not incident to the conferred powers, the statute also authorized them in express terms, to borrow money, to complete, furnish and operate their road; and while the statute conferred upon them the right to use various methods, and among them, that of mortgaging their property and franchises for the payment of any debt or contract they may have made, it does not in terms, prohibit any contract to secure that end. A railroad corporation can only construct their railway through the means of personal agencies, such as contractors, engineers, &c. The whole completion of this road, including materials, fencing and other expenses,

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was by this contract, to be done and furnished by the defendants who are called therein, the contractors. To secure them for such advances and for so constructing and completing the railway, the contract provides a security by pledging the property so to be completed, with its franchises and income to such contractors. The character of this contract or its designation in law, may be a question of law. Its name is entirely an immaterial matter. It has the characteristics of a mortgage, and is for certain purposes a mortgage to secure for future advances to the main object of the enterprise. And if there is any feature in it that partakes of the nature of a lease, it does not destroy its character as a mortgage, and I am unable to see that such a contract is prohibited by law, or against public policy. It is a contract for security, for means to be borrowed; to enable the railroad company to construct and complete their road. This is not *ultra vires*. I do not hold that it would were it a lease only.

As I have failed to discover in the facts presented in the papers, any apparent injustice towards stockholders in this contract or any infraction of legal rights thereby committed, there is no reason to reverse the order on that ground. Nor can I find from the language of the contract, that it is a lease to individuals to operate the road without the supervision or control of the company. So far as this is a question of fact, I differ from the learned judge. The company have as good a right to employ the contractors as their agents to run and operate the road as others. It can only be done by agents; contractors are not excluded from being agents, and the right of the contractors thus to secure their advances, by acting as such agents, is not forbidden in law. I think, the learned judge was in error in his view of the law in this regard, while, I think, the conclusion of the learned judge in denying the injunction was right, and while it is therefore unnecessary, further to discuss his view of the right of the railroad commissioners to bring the action, and the

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necessity of its being brought by the supervisor, I merely desire to say, that I do not intend to be understood as adopting his view of the law, in that regard. By the terms of the proposed contract, the railroad company have not attempted to transfer the right of eminent domain, nor is all supervision or control of the franchise transferred by this contract. I think this order should also be affirmed, with ten dollars cost of each motion to each party who separately appear by counsel.

DANIELS, J.—I concur in the conclusion as to each of the orders appealed from, but think as the Code confers power to impose costs on the decision of a motion only to the extent of ten dollars, that all the costs allowed should not exceed that limit.

PARKER, J.—I am of the opinion, that the injunction order granted by the county judge of Ulster, was valid as within his authority to grant, and that upon the merits, it should have been sustained. I think, therefore, that the order setting it aside should be reversed with ten dollars cost.

In the other case, I think, enough was shown to entitle the plaintiff to the injunction order, for, whether the suit was commenced by the commissioners or the supervisors of the town, is not a question proper to be considered upon the motion.

This order should also be reversed, with ten dollars cost.

I agree with judge DANIELS, that only ten dollars cost were allowable upon each motion, and not that sum to each party appearing by a different attorney, and the same upon each appeal.

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N. Y. SUPERIOR COURT.

ALBERT B. COREY, plaintiff, agt. WALTER P. LONG, defendant.

James M. Gano, a dentist of the city of New York, was appointed receiver in this action to take charge of the property and effects of the defendant, which consisted of spool silks and skein silks, which was formerly the property of the plaintiff and defendant as copartners, and which silks were in cases like wardrobes, and contained in a part of the second floor of the building 290 Broadway N. Y., 8 feet by 36 feet in size.

Under the order appointing the receiver he was authorized to sell the property at public or private sale, and upon a private sale thereof the receiver claimed to have received from all sources \$8,123 04-100 and to have paid out \$3,888 49-100. These expenditures included large payments for alleged services to deputy receivers, keepers, the plaintiff in the action, plaintiff's counsel and the receivers counsel. The proceedings were concluded within about three or four months.

On determining the only questions properly before the court, to wit; the extent of the powers of the receiver, the manner in which he discharged his duties, his charges therefor, the state of his accounts, the balance due by him and the relief to be granted to insure the payment of such balance; and on discussing and considering fully the powers and duties of receivers generally:

Held, that it was sufficient to say that upon his own showing, the receiver's conduct in this case had been reckless; that he had been unmindful of the solemn duty which he owed to the court that appointed him and to the interests of the parties and their creditors. His charges could not be indorsed as necessary expenditures in the proper execution of his trust, or under any order, or in the course and practice of the court. Their sanction would cast disgrace and reproach upon the administration of justice.

A receiver who steps outside the order appointing him, and assumes the role of an actor without the consent of or notice to the parties or the court, must be taught that the law will hold him to a strict account, and that the court, on the final passage of his accounts, will not ratify any expenditure unless the same has been necessarily incurred for the benefit of the estate.

At Special Term, June, 1872.

FREEDMAN, J.—This cause was brought on and submitted upon the pleadings, and all proceedings and orders heretofore had and made therein, for the final determination of such questions as remain undecided. From the papers thus

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submitted, it appears that prior to the 7th day of December, 1869, Albert B. Corey and Walter P. Long, were partners under the firm name of Walter P. Long & Co. On December 7th, 1869, Corey sold to Long his (Corey's) interest in the partnership property and effects, and Long agreed to pay the existing debts of the partnership. On the 13th of January, 1870, Corey commenced his action in this court, for the purpose of restraining Long from interfering with the property of the firm of Walter P. Long & Co., and for the appointment of a receiver to take possession of the property and assets, convert them into money, and pay the debts of the partnership. At the commencement of the suit, an order was granted by a justice of this court, enjoining Long, in accordance with the demand of Corey's complaint, and a further order was made by the same justice, and entitled and entered as an order made by the court at special term, appointing James M. Gano as receiver of all the property and assets of the late firm of Walter P. Long & Co. On the 17th of January, 1870, and upon motion papers presented by Long, an order was made staying proceedings, under the first named two orders, and requiring Corey to show cause why they should not be vacated. This last order was, on the same day so far modified by the justice who had made the appointment of the receiver, as to allow the receiver and an officer of this court, Mr. Cosgrove, to take and hold possession of the property until the final order of the court. Upon the hearing of the motion at the special term, the order appointing the receiver was vacated, but the motion to dissolve the injunction denied. On the 31st of January, 1870, the court, at special term, upon a new motion, founded upon notice duly granted, an order appointing the said James M. Gano receiver, "of all the stock, fixtures, assets and property of whatever nature and kind soever, belonging to the firm of Walter P. Long & Co., with all the usual power and authority granted to receivers in such cases made and provided." Upon such appointment, the receiver filed a bond in the sum of \$5,000.

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On February 4th, 1870, an order was made by the justice who had originally granted the injunction and appointed the receiver, without notice to any of the parties to the cause, and wholly upon the *ex parte* application of the receiver, bearing date of that day, which, after the recitals contained therein, provides as follows :

"It is ordered, that the said James M. Gano, receiver of the firm of Walter P. Long & Company, be, and he is hereby authorized, empowered and directed to sell at public or private sale, all the personal property belonging to said firm of Walter P. Long & Company, now in the possession and charge of him, said Gano.

"And it is further ordered, that the said James M. Gano be authorized, empowered and directed to pay out of the proceeds of said sale or sales all the necessary charges and disbursements incurred by him in the keeping and preserving said property, and also all the necessary disbursements and charges that may be incurred in carrying out this order.

"And it is further ordered, that the said James M. Gano, safely invest the proceeds arising out of the sale of said property, after deducting the necessary charges and expenses, and hold the same until the further order of this court."

On February 23d, 1870, the defendant, Long, appealed to the general term from the orders of the special term, refusing to vacate the injunction and appointing a receiver. The general term reversed the said orders on the ground, that the plaintiff, Corey not having reserved a lien upon the partnership property, so as to require its application to the payment of the partnership debts, the defendant, Long had acquired an absolute title; that Long's mere personal covenant to pay such partnership debts, and to indemnify Corey against them, did not give Corey such a lien upon or interest in or equity against the property in dispute, as is necessary to exist for the maintenance of the action.

On the 22d of April, 1870, William McFarlane, a creditor of Corey & Long, commenced proceedings in the

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district court of the United States for the southern district of New York, against Corey & Long, to obtain an adjudication of bankruptcy against them, and on April 30th, 1870, such an adjudication was made, and William P. Buckmaster having been appointed assignee in bankruptcy the court in bankruptcy, duly assigned to him all the property of the bankrupts, and each of them, by assignment, dated May 25th 1870.

Thereupon, this court at the May special term of 1870, granted and duly made an order, pursuant to a motion, made on notice for that purpose, declaring the action abated, except for the purpose of passing the accounts of the receiver and of determining the amount of his fees, adjudging the said William P. Buckmaster as such assignee entitled to the property in controversy subject to such accounting, referring it to a referee to pass the accounts of the receiver, and to ascertain and report to the court the result of such accounting, and substituting the said William P. Buckmaster as the sole party to the action in the place and stead of the said Albert B. Corey and Walter P. Long, for the sole purpose of such accounting, and of prosecuting the said order and procuring a delivery of the said property to him.

Before the referee the receiver filed an account showing, that between February 5th, 1870, and March 28th, 1870, he had received in all from the property of which he took possession, \$8,123 04-100; that he had paid to the assignee \$2,500, and that he claimed credit for other payments made on account of expenses incurred, \$3,888 49-100. The referee found some of the amounts charged to be excessive, but allowed a large portion of the payments for which the receiver claimed credit, and adjusted the balance due by the receiver at \$2,317, 40-100, and directed that sum to be paid to the assignee in bankruptcy.

The assignee in bankruptcy and the receiver severally excepted to the referee's report. Upon these exceptions being brought to a hearing on the 1st day of March, 1872, the

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court made an order directing the referee to take and reduce to writing and certify to the court such further evidence touching the amounts actually paid by receiver to keepers or other persons employed by him in taking care of, or selling or disposing of said property, and as to the necessity of employing such keepers and assistants, and as to the reasonableness and propriety of the sums paid or allowed to such persons respectively, by such receiver, and also directing that the further hearing of this cause upon the referee's report already made, and the exceptions [thereto be laid over until the coming in of such further testimony, and that upon such coming in, either party might bring on the hearing on notice, and that upon such hearing any order made in this cause might be produced and referred to in the same manner and with the like effect, as if such order had been produced in evidence before such referee. Such further evidence has been and is now submitted.

Upon these matters and proceedings, I must hold, that the assignee in bankruptcy is not entitled to an adjudication, as claimed by him, (1st,) that the legal process under which the receiver took possession of the property in controversy, even if such property belonged to Cory & Long jointly, was in fraud of the bankrupt law, and was therefore, void as against the assignee; (2d), that, as the orders appointing Gano as receiver only authorized him to take possession of the partnership property of Cory & Long, and he, in point of fact, took property by virtue of his said appointment, which in judgment of law had become the property of Long individually, he was a trespasser from the beginning and is chargeable as such with the highest value of the goods and property taken by him, from the time of its taking to the end of the trial, without any deduction or allowance whatever for expenses or otherwise.

The order for his appointment clearly contemplated, that he should take possession of the identical property which he subsequently took, and if this court, in granting the said

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order at special term, made a mistake as to the law applicable to the case as then presented, the receiver cannot be made to suffer for it.

Again, the assignee in bankruptcy cannot at this late day question the validity of the order made at the May special term of 1870, declaring the action abated, except for certain purposes therein specifically enumerated. If he felt aggrieved by it, he should have appealed. Not having done so, but having accepted the benefits conferred by the order and proceeded under it, he is bound by it.

The only questions, therefore, which are properly before me for determination, relate to the extent of the powers of the receiver, the manner in which he discharged his duties, his charges therefor, the state of his accounts, the balance due by him and the relief to be granted to insure the payment of such balance to the assignee. These questions must be determined according to the well settled course and practice of courts of equity.

The appointment of receivers is a high power. It is never exercised if any other safe or expedient remedy can be used, and never where irreparable injustice might follow. Prior to the adoption of the Code, there was, as shown by Van Santvoord, in the admirable treatise on equity practice, no statutory provision which professed to define the powers of a court of equity in the appointment of receivers. But a long line of decisions and a uniform course of practice in the courts of chancery, both in this country and in England, had marked out the jurisdiction asserted by the courts in this respect and defined with tolerable accuracy the cases in which this extraordinary power would be exercised.

By section 244, the Code attempts, in a few general statutory provisions, to condense the whole body of the practice, both in law and equity, in this respect and to mark out the general rules governing the appointment of receivers. But these provisions are of so general a character that under another provision of the Code, which retains the old rules

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and practice where they are not inconsistent with the Code, or have not been expressly abrogated, old principles may, and must still, be resorted to for the determination of particular questions.

The exercise of the power, therefore, must depend, as it always did, upon the sound discretion of the court in each particular case, in which it is made to appear as fit and reasonable, that some indifferent person should be appointed as receiver. But there is no case in which the court appoints a receiver merely because the measure can do no harm.

A receiver appointed by the court, is appointed not on behalf of the complainant or of the defendant only, but for the benefit of all parties who may establish rights in the cause; and the money in his hands is in *custodia legis* for whoever can make out a title to it. The court itself has the care of the property in dispute; the receiver is but its creature and, therefore, an officer of the court.

As a general rule, the receiver should be a person wholly disinterested in the subject matter of the suit (*Bennett's Master*, 93) and should not interfere in any litigation between the parties (*Comyn agt. Smith*, 1 *Hogan*, 81). This principle was formerly adhered to with such strictness that courts held that the receiver ought not to make any application to the court in the first instance; that if he find himself in circumstances of difficulty, he should apply to the plaintiff to make the necessary application, and that only on plaintiff's refusal so to do, the receiver may properly apply (*Parker agt. Dunn*, 8 *Beav.*, 497). And the practice thus laid down the courts enforced so rigorously that whenever a receiver brought forward a motion without having previously applied to the proper party to make it, it was refused, and the receiver, in some instances, ordered to pay the costs (*In re Doolan*, 2 *Cow. & L.*, 232; *S. C., Dr. & War.*, 442; *Clark agt. Fisher, San. & Sc.*, 684; *O'Connor agt. Malone*, 1 *Ir. Eq.*, 20; *Wrixson agt. Vise*, 5 *Ir. Eq.*, 276; *Richards agt. Goold*, 7 *Ir. Eq.*, 209).

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It being the duty of a receiver to remain indifferent between the parties, and not to interfere in the litigation pending between them, it becomes his further duty to protect the property entrusted to him, to the best of his ability, for the interests of all parties to the suit, no matter how various and conflicting these interests may be, without allowing himself to be controlled by the representatives of any one of the parties (*Iddings* agt. *Bruin*, 4 *Sandf. Ch.*, 417), and consequently he will not be permitted, except upon the consent of all parties, to employ the counsel, solicitors or attorneys of either of the parties to the suit to assist him in the discharge of his duties. The attorneys, solicitors or counsel of the several parties, are bound in duty to their clients to watch the proceedings of the receiver, and to see that he faithfully discharges the duties of his trust (*Ryckman* agt. *Parkins*, 5 *Paige's Ch.*, 545).

Being the mere instrument or hand of the court, he has a right, at any time, to apply to the court for instructions as to his duties under the orders of the court (*Curtiss* agt. *Leavitt*, 1 *Abb.*, 274), and the court will advise and afford him all necessary and proper protection.

Thus, the possession of a receiver is not to be disturbed without leave of the court (*Brooks* agt. *Greathed*, 1 *Jac. & Walker*, 178), and even an action cannot be brought against him without such leave (*Angel* agt. *Smith*, 9 *Ves.*, 335). It is a contempt of court for a third person to attempt to deprive him of that possession by force or even by a suit or other proceedings, without the permission of the court by whom the receiver was appointed (9 *Ves.*, 359).

Where violence is threatened, a writ of assistance directed to the sheriff may, in some extreme cases, be obtained, or the court may attach the wrongdoer (*Fitzpatrick* agt. *Eyere*, 1 *Molloy*, 171).

And where a receiver has been dispossessed by an act of a third party not sanctioned by the court, an attachment may issue against such third party, and the latter may not only

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be punished for the contempt, but compelled to restore the property (*Noe agt. Gibson*, 7 *Paige*, 513).

Again, being the mere creature of the court, a receiver, unless appointed under a special statute for a special purpose, as, for instance, the statute directing proceedings against corporations (2 *R. S.*, 438), has no powers except such as are conferred upon him by the order for his appointment, and the course and practice of the court (*Verplank agt. Mercantile Ins. Co.*, 2 *Paige's Ch.*, 452).

The rules of the English court of chancery were formerly strict in not allowing a receiver to do many things, such for instance, as making leases, or even repairs without a previous approval of a master, and he was not permitted under any circumstances to lay out more than a very small sum at his discretion. The court even exercised great caution in granting a reference to a master for the purpose of ascertaining whether the proposed transaction was or was not for the benefit of the parties interested.

But, says Mr. Hoffman, our court would undoubtedly sanction, when performed, what it would have directed to be done; and it is the constant course for officers of this description to perform their duties without the previous approval of the court (*Hoffman's Master*, 156).

To this ascertainment Mr. Edwards, in his admirable work, on receivers in equity, very properly replies that, "if this be so, he must get his power through the practice of the court, and we are inclined to doubt whether a receiver should step far out of his order without its authority. The point is not whether the court may possibly protect him when he has volunteered an act, but whether he ought to have done it without direction."

This, in my judgment, is not only the correct view, but the proposition thus laid down should be strictly adhered to. To command and retain public confidence, and respect in a country founded upon free republican institutions, like ours,

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courts cannot afford to sanction loose practice in the management of estates in dispute.

What then is the course and practice of the courts in such matters? It is prescribed by the 92d rule of the general rules of 1858, (the 93d of the revision of 1871), which is as follows:

"Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor where it is necessary or proper for him to do so; and he may apply for and obtain an order of course, that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver and pay their rents to him. He shall also be permitted to make leases from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor, without the special order of the court, until after judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may, by leave of the court, sell such desperate debts and all other doubtful claims to personal property at public auction, giving at least ten days public notice of the time and place of such sale."

The examination thus far made has established beyond doubt, that the receiver in this case possessed no powers, except such as were conferred upon him by the orders of his appointment, the order of the 4th of February, authorizing him to sell, and the rule referred to. These have been quoted in full, and any act done beyond them, he must

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justify either by the consent of the parties in interest, the special order of the court obtained for the purpose, or the clear necessities of the case. It is true that the order of the 4th of February, 1870, is itself, open to criticism, for the reason, that it was made upon the *ex parte* application of the receiver, without notice to any of the parties, and not by the court, but by a judge out of court. But as no steps have ever been taken to have it set aside on motion, or reversed upon appeal therefrom, and the receiver has acted under it, the assignee in bankruptcy is too late to question it so far as it affords protection to the receiver for acts done under it in good faith. The irregular manner, however, in which it has been obtained, and the fact that the receiver has not seen fit to apply to the court for any instructions under it, as he might have done in case of doubt or difficulty, impose upon the court the duty of holding the receiver to a strict account of his stewardship under the same.

I now proceed to examine the manner in which the receiver executed the trust and his charges therefor. He claims to have received from all sources, \$8,123 04, and to have paid out as necessary expenditures \$3,888 49. These expenditures include large payments for alleged services to deputy receivers, keepers, the plaintiff in the action, plaintiff's counsel and the receiver's counsel.

Descending still further into particulars, it is found that the goods consisted of spool silks and skein silks, that the cases of goods were like wardrobes, and that all the property was contained in a part of the second floor of the building No. 290 Broadway, in the city of New York. The receiver claims to have superintended the whole business of the receivership, but at a later stage of his examination, he admits that he had also to attend to his own business, which was that of a dentist, and that he employed deputy receivers to act for him during his absence. One of these was George L. Simonson, a lawyer, who had his office in the same building in which the property was contained. According to the

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receiver's statement, Simonson was employed at the rate of \$15 per day, and under such arrangement, actually received \$690. According to Simonson's version he was employed by the receiver to make an inventory under each of the two orders for the appointment of said receiver, that he was paid \$150 for each of the said inventories, that he subsequently charged the receiver \$250 retaining fee for his services as counsel in supervising the accounts and attending to the sales of the assets, and taking charge of all the moneys collected; that he was afterwards paid the sum of \$40 for disbursements, and that these were all the amounts he received. These sums amount in the aggregate to \$590 or \$100 less than the receiver swears he paid. Moreover, it appears, that each of the inventories consisted of only eleven lines, and that Simonson on the 12th day of May, 1870, was substituted as attorney for the plaintiff in the action.

As to the employment of the plaintiff, A. B. Corey, who had a three years' experience only in the business, the receiver testifies that he employed him at the rate of \$20 per day, but not for any specified time, to sell the goods; that Mr. Corey was thus employed from January 31st, 1870, to March 17th, 1870, and received \$920 for such services. This statement, if true, shows that Corey received the same pay for Sundays as for week-days during the period named. The assignee in bankruptcy, on the other hand, shows by disinterested witnesses, that the services of a competent man to take charge of and wind up the business, should not have exceeded \$200 per month. It finally appears, that besides the plaintiff the receiver engaged the services of one J. A. Conklin as collector and assistant salesman, of one C. F. Merritt, "to sell goods, bring in customers, and mark goods;" of C. B. Corey, plaintiff's brother, "to mark and sell goods;" and of one Colton, "to sell goods on a commission."

As to the employment of deputy receivers, the receiver swears that he had two of them, and yet, in other parts of his examination he refers to Simonson, Ward, Early and

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James Clark as deputy receivers, and shows payment to them as such. He also enumerates Ward, Early and Clark, as keepers in conjunction with Cosgriff, Griffin and Conklin, and shows payments to all of them as such keepers. The employment of this large force to stand guard over premises proven to be eight feet by thirty-six feet in size, the receiver accounts for by stating that in consequence of threats made by Long, he, the receiver, thought it necessary to have a good many keepers for fear that he might be put out of possession. But he cannot remember what Long said, and he never considered the threats, as made, of sufficient importance to report them to the court and to ask the court's instructions and protection. Not one of these keepers has been placed upon the witness stand, to prove the extent of services really performed.

Time and space will not permit me to enumerate in detail all the irregularities, inconsistencies and absurdities which appear to have been committed by the receiver. Suffice it to say that, upon his own showing, his conduct has been reckless and unmindful of the solemn duty which he owed to the court that appointed him, and to the interests of the parties and their creditors. His charges cannot be indorsed as necessary expenditure in the proper execution of his trust or under any order, or in the course and practice of the court. Their sanction would cast disgrace and reproach upon the administration of justice. I exceedingly regret the necessity for the use of such harsh language. But its employment on this occasion is imperatively called for by the evidence as well as by considerations of public policy touching the due administration of the law. A receiver who steps outside the order of his appointment, and assumes the role of an actor, without the consent of or notice to the parties or the court, must be taught that the law will hold him to a strict account, and that the court, on the final passage of his accounts, will not ratify any expenditure

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unless the same has been necessarily incurred for the benefit of the estate.

With these remarks, I proceed to pass specifically upon the questions presented by the exceptions filed to the referee's report, and to determine the allowances to which the receiver is entitled. My conclusions are as follows:

First. The referee correctly held that the sum of \$690 paid to G. L. Simonson, is not a proper charge against the moneys in the hands of the receiver. The duties performed by Simonson should have been performed by the receiver. The latter had no power to appoint a deputy to be paid out of the fund.

Second. The referee correctly held, that the amount of \$920 paid to Albert B. Corey, the plaintiff, is excessive. But he erred in subsequently allowing \$700 in place thereof. According to the theory upon which the action was instituted, it was plaintiff's own interest to have the goods realize as much as possible. He should for that reason have lent his efforts willingly without compensation to secure such a result. But under the decision of the general term above referred to, plaintiff never had a cause of action. He wrongfully managed, by a resort to the forms of law, to have a receiver appointed over the property of his late partner. In this way plaintiff eventually succeeded in throwing the entire affairs of the late copartnership into bankruptcy, and having succeeded in that, it would be an infringement of the rights of his late partner and of the creditors of the firm to award him an exorbitant compensation at their expense for services which it was his interest to perform, especially when it is borne in mind, as it always must be, that the receiver employed him without authority and without notice to the defendant. The item of \$700 must be disallowed. In place thereof, the receiver may have a general allowance of \$300 for the employment of a competent person to take charge of, and wind up the business.

Third. Having already demonstrated the want of the re-

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ceiver's power to appoint a deputy to be paid out of the fund, the referee was right in disallowing the claim of \$1,435 for keepers and deputy receivers. But the sum of \$756 allowed for keepers at the rate of three dollars per day for each keeper for twenty-eight days, must be still further reduced. Considering the nature, quantity and quality of the property and the size and location of the premises, I can, upon the whole evidence, perceive of no necessity which rendered the employment of more than two proper and justifiable. Consequently, the sum of \$168 is all that can be allowed on that account.

Fourth. As to the claim of \$350 paid to Roger A. Pryor, counsel for the plaintiff, there seems to be sufficient evidence to sustain the finding of the referee that the said sum was paid over under an order made by a justice of this court. As no appeal has been entered from that order, nor any steps taken to have it set aside, that item is allowed.

Fifth. The allowance of \$240 to James F. Morgan, for services as counsel to the receiver, cannot be approved, although in cases presenting difficult questions, a receiver, instead of taking up the time of the court with frequent applications for instructions, may and should apply to his own counsel, yet this should be done either with the sanction of the court or at the expense of the receiver. In the present case, no authority to employ counsel was asked for, or given, and no necessity for such employment appears from the evidence. Moreover, from the whole conduct of the receiver it is clearly apparent that the said counsel either did not advise the receiver as to his proper conduct, and therefore, earned nothing, or else gave erroneous advice which was of no value. For these reasons, the claim of \$240 must be disallowed.

Sixth. The finding of the referee allowing \$253 49-100 for rent, janitor, office-boy, postage and other incidental expenses has not been questioned.

Seventh, The allowance to the receiver of the sum of \$406 15 for his fees may stand. But as his conduct has

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rendered two references necessary, he must be charged with the sum of \$227 50, which is one half of the expense thus occasioned.

Eighth. The exceptions filed by the receiver are overruled, and those of the assignee in bankruptcy are sustained as far as necessary to conform the report of the referee to the views and allowances herein laid down and made. The balance chargeable against the receiver after these corrections are made, together with interest thereon, the assignee in bankruptcy is entitled to have. To recover it, such assignee may have leave, (1st), to issue execution; (2d), to apply for an attachment against the receiver in case of nonpayment, and (3d), to sue the sureties upon the bond given by the receiver.

DIGEST

OF

ALL THE DECISIONS

CONTAINED IN THE FOLLOWING REPORTS:

43 *Howard's Pr. R.*; 46 and 47 *N. Y.*; 60 *Barbour's R.*;
and 4 *Lansing's R.*

A.

ABATEMENT.

1. Upon the death of a sole defendant in an action, in which such defendant has interposed a counterclaim, and issue has been joined thereon, the representatives of such deceased defendant have a right to continue the action, if the cause of action is one which by law survives to them. (*Livermore agt. Bainbridge, ante, 272.*)
2. The action in such a case is not abated (*Code, § 121*), and the court will, upon motion, allow it to be continued by the executors. (*Id.*)
3. Where a defendant interposes a counterclaim in an action, and asks for affirmative relief, and issue is joined upon his claim, he becomes an actor in the case, and may proceed in it as if he were in fact a plaintiff (*Affirming S.C., at Special Term, 42 How., 53.*) (*Id.*)

ACCEPTANCE.

1. Defendant had in his hands for collection a claim, one-half of the pro-

ceeds of which he had agreed to pay plaintiff. One M. drew an order upon defendant, requesting him to pay plaintiff \$500 out of the other half when collected, which order defendant accepted, and upon the acceptance plaintiff paid to M. the amount of the order. Defendant collected upon the claim \$1,050,

Held, that the acceptance of the order was an admission by defendant, that the moiety of the collection not agreed to be paid to plaintiff belonged to M., and was an undertaking to pay such moiety to plaintiff, not exceeding \$500. (*Richardson agt. Carpenter, 46 N. Y., 660.*)

See **APPEAL.** (*Id.*)

CONTRACTS. (*Id.*)

HUSBAND AND WIFE. (*Id.*)

VERNOL agt. KEELER (mem.) (47 *N. Y., 674.*)

CONTRACT. (4 *Lansing.*)

SALE OF CHATTELS. (*Id.*)

ACCOUNT.

See **COUNTER-CLAIM.** (46 *N. Y.*)

1. In order to obtain an account of the

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personal estate which came to the hands of an administratrix—she being dead—her personal representatives are indispensable parties. (*Silbes* agt *Smith*, 60 *Barb.*, 372.)

See ACTION. (*Id.*)
CHattel MORTGAGE. (*Id.*)
TENANTS IN COMMON. (*Id.*)
TENANTS FOR LIFE AND IN REMAINDER. (*Id.*)

ACCOUNTING.

See ARREST. (4 *Lansing.*)
CONTRACT. (*Id.*)

ACTION.

See CAUSE OF ACTION. (46 *N. Y.*)
ELECTION OF REMEDIES. (*Id.*)
FRAUD. (*Id.*)
LIMITATION OF ACTIONS. (*Id.*)
LEASE. (*Id.*)
PARTITION. (*Id.*)
TENANTS IN COMMON. (*Id.*)

1. An action commenced in one of the district courts of the city of New York, and removed to the Common Pleas of that City pursuant to sec. 37 of chap. 344, Laws of 1857, permitting actions to be so removed where the claim or demand exceeds \$100, is an action commenced in Justices' Court, and is not appealable to this court, unless the General Term from whose judgment the appeal is brought, shall by order allow such appeal as prescribed by sec. 11, sub-division 3 of the Code. (*Heinrich* agt. *Kom*, 47 *N. Y.*, 658.)

See BANKRUPT LAW. (47 *N. Y.*)
CAUSE OF ACTION. (*Id.*)
EQUITY. (*Id.*)
FRAUD. (*Id.*)
JURISDICTION. (*Id.*)
TRIAL. (*Id.*)

2. Where the title of the parties depends upon the construction to be given to a will, and the defendants are in possession, claiming that by the will they are entitled to exclusive possession, and they deny the plaintiff's right, an action for a construction of the will, for a partition and for an accounting, will lie; and this court will not require the plaintiff to first try the question of title, in an action of ejectment. (*Scott* agt. *Guernsey*, 60 *Barb.*, 163.)

See CLOUD UPON THE TITLE. (60 *Barb.*)
HIGHWAY. (*Id.*)

3. The plaintiff occupied the defendant's lot for twenty years, mistaking it for adjoining premises, of which he had a

deed; the defendant, who owned contiguous property also, then brought ejectment for the lot, and the plaintiff, who supposed that there was a question as to an unimportant intrusion upon the boundary of the defendant's contiguous property only, agreed, in writing, to surrender the premises claimed, in consideration of a discontinuance, and afterward, having discovered his error, brought this action to rescind the agreement:

Held, that the action could be sustained. (*Smith* agt. *Martin*, 4 *Lansing*, 41.)

4. A promise made upon valid consideration to pay a third person, will sustain an action by the third person in his own name against the promisor. So *Held*, of an agreement under seal. (*Hall* agt. *Robbins*, 4 *Lansing*, 463.)

5. An action against a corporation cannot be maintained by a stockholder to effect a forfeiture of its charter for non-user of its powers within a year. (*Gilman* agt. *Green Point Sugar Company*, 4 *Lansing*, 482.)

6. Where an action is brought by the attorney-general for such purpose, it seems a receiver cannot be appointed until judgment in the action. (*Id.*)

See ARREST. (4 *Lansing.*)
ASSESSORS. (*Id.*)
BAIL. (*Id.*)
BASTARDY PROCEEDINGS. (*Id.*)
BRIDGES. (*Id.*)
CHattel MORTGAGE. (*Id.*)
CONTRACT. (*Id.*)
CORPORATION. (*Id.*)
COSTS. (*Id.*)
DEFENCES. (*Id.*)
DONATIO CAUSA MORTIS. (*Id.*)
EVIDENCE. (*Id.*)
EXECUTION. (*Id.*)
HIGHWAYS AND STREETS. (*Id.*)
HUSBAND AND WIFE. (*Id.*)
INSURANCE. (*Id.*)
LEASE. (*Id.*)
MANUFACTURING CORPORATIONS. (*Id.*)
MARRIED WOMEN. (*Id.*)
MORTGAGE OF REAL ESTATE. (*Id.*)
MISTAKE OF LAW AND FACT. (*Id.*)
NEXEAT. (*Id.*)
NEW YORK CITY. (*Id.*)
ORDER OF COURT. (*Id.*)
PARENT AND CHILD. (*Id.*)
PARTIES TO ACTION. (*Id.*)
PENALTY. (*Id.*)
PRACTICE. (*Id.*)
SALE OF CHARTER. (*Id.*)
SURFACE WATER. (*Id.*)
TOWNS. (*Id.*)
USURY. (*Id.*)

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ACT OF CONGRESS.

1. The mandate of the act of congress of 1789, that where the proper steps are taken, which entitles defendant to the removal of a cause to the circuit court of the United States, the state court shall "proceed no further in the cause," is obligatory as well upon a court of appellate as of original jurisdiction. (*Holden vgt. Putnam Fire Ins. Co.*, 46 N. Y., 1).

See STAMPS. (47 N. Y.)

TRIAL. (*Id.*)

FEDERAL COURTS. (4 *Lansing*).
JUDGMENTS. (*Id.*)

ADJOINING OWNERS.

See EASEMENT. (4 *Lansing*).

ESTOPPEL (*Id.*)

SURFACE WATER. (*Id.*)

ADJOURNMENT.

See JUSTICE OF THE PEACE. 4 *Lansing*).

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.
(4 *Lansing*).

ADMIRALTY.

1. The steamer Patapasco, a vessel owned or chartered by the Commercial Steamboat Company, a corporation incorporated by the laws of Rhode Island, was engaged in making weekly trips between New York and Baltimore in a line with other vessels belonging to the company. (*The Steamer Patapasco*, ante, 301.)
2. On each occasion that she started from Baltimore the agent of the company gave written requisitions to Mr. Boyce, a coal miner, who had extensive coal depots at Baltimore, to deliver on board of the steamer (by name) various quantities of coal. Mr. Boyce on receiving the above requisitions, gave written orders to his agents to deliver on board of the steamer (by name) the same quantities. (*Id.*)
3. The coal was necessary, indeed indispensable to enable the steamer to make her various voyages. To save useless accumulation of bills, Mr. Boyce tendered one general bill each month to the company (by name) making them debtor to the various accounts. The steamer had no funds to pay for the coal and the company were in an embarrassed state which shortly thereafter resulted in total bankruptcy. (*Id.*)

4. On a libel filed *in rem* by Mr. Boyce against one of the steamships for coal used, it was *held* by the United States district court of New York, (SHIPMAN, D.J.) that he had no lien on the steamship for the coal. The United States circuit court (NELSON, C.J.), reversed the district Court and *held* that he had, and the supreme court now affirm the circuit court holding:

1. That it appearing that the Patapasco was in a foreign port and that the coal was ordered for her *specifically by name* and delivered to the officers in charge of her; that the coal was necessary, in such a case the inference is that the credit was given to the vessel, unless it can be inferred that the master had funds, or the owners had credit and that the material man knew of this, or knew of such facts as should have put him on inquiry.

2. The Libel. (10 *Wal.*, 192), alluded to and approved of.

3. The coal being sold for cash at the lowest market price, it is clear that there was no credit given to the company at the time of sale.

4. When the libellant waived his privilege of cash on delivery and put the coal on board of the steamship, the presumption of law would be that he thereby gave credit to the steamship and not to the owners thereof, inasmuch as the supplies were furnished in a foreign port.

5. If the credit was to the vessel there is a lien and the burden of displacing it is on the claimant.

6. He must show affirmatively that the credit was given to the company to the exclusion of a credit to the vessel.

7. Entries in the books of the party supplying the materials, while they may tend to support either view of the facts of credit according to the entry, yet are not conclusive, and are always explainable, and the truth of the transaction can be shown independent of them.

8. The recent decisions of the supreme court in cases of liens sought to be enforced by material men, for supplies furnished to vessels in foreign ports, have had the effect to place liens on a more substantial footing than some previous cases seem have left it. (*Id.*)

See FEDERAL COURTS. (4 *Lansing*.)

ADMISSIONS AND DECLARATIONS.

See EJECTMENT. (47 N. Y.).

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EVIDENCE. (*Id.*)
GIFT. (*Id.*)
TRIAL. (*Id.*)

ADVERSE POSSESSION.

1. To maintain an action for the partition of lands, the plaintiff must, at the time of its commencement, have actual or constructive possession in common with defendants. A subsisting adverse possession is an absolute bar. The possession of one of several tenants in common may become adverse, when his acts amount to an exclusion of his co-tenants; and until the excluded parties regain their possession, no one of them can bring partition. The duration of the adverse possession is immaterial. (*Florence agt. Hopkins, 46 N. Y., 183.*)

2. A grantor in a deed may hold adversely to his grantees. (*Cramer agt. Benton, 60 Barb., 216.*)

3. The testator devised an undivided third of his lands, to be held upon certain specified trusts, to an unincorporated society, which, having been incorporated after his decease, and authorized to take by devise made voluntary partition with the heirs-at-law, entered upon its third, and continued to occupy, claiming the sole and exclusive ownership, and without conforming with any of the provisions of the trust for twenty years:

Held, that the corporation held and was entitled to dispose of the property as owner of the fee, and not subject to the trusts specified in the will, notwithstanding it entered claiming under the will. (*Matter of Roman Catholic Society of Newport agt. Schuyler, 4 Lansing, 14.*)

4. An erroneous boundary line run between adjoining owners, who have no dispute as to the true line, is not a settlement of a disputed line; and acquiescence in the erroneous line, for less than twenty years, does not preclude the original owners, or their grantees, from claiming a different line. (*Smith agt. McNamara, 3 Lansing, 169.*)

See GRANTOR AND GRANTEE. (*Id.*)

AFFIDAVITS.

See INJUNCTION. (60 Barb.)
FORECLOSURE. (4 Lansing.)
JUSTICE OF THE PEACE. (*Id.*)
REVENUE STAMPS. (*Id.*)

AGENCY.

See PRINCIPAL AND AGENT. (4 Lansing.)

AGENT.

See PRINCIPAL AND AGENT. (4 Lansing.)

AGREEMENT.

1. Where the defendant, in possession of real estate, under a contract to purchase the same of the owner—having made partial payments on the consideration price and made improvements upon the premises, enters into a parol agreement with the plaintiff for an advance of money to enable him to pay up the purchase price of the premises to the owner, that the plaintiff as his security is to take the legal title from the owner, and to execute a written agreement to the defendant to convey to him the title on payment by the defendant of such advance with interest, at a specified time, which parol agreement is fulfilled so far as the defendant is concerned, by having the deed made, executed and delivered to the plaintiff, on receiving such advanced sum; and the plaintiff thereupon refuses to execute and deliver to the defendant the writing declaring the rights of the defendant under the parol agreement, but sets him at defiance, and commences an action of ejectment against him to recover possession of the premises:

Held, that so gross a fraud ought not to be permitted, and that the principles upon which courts of equity enforce agreements that have been in part performed are an adequate protection to the defendant. (*Dodge agt. Welman, ante, 427.*)

2. There is nothing in the statute of frauds which in any degree interferes with the equitable jurisdiction of a court of equity in such cases, but on the contrary, either with or without the saving clause in the statute (in reference to agreements for the sale of lands, &c., to be in writing, &c.) the court always prevents the use of the statute as a cover and protection to the fraudulent party. (*Id.*)

See CONTRACTS. (46 N. Y.)

3. The plaintiff's farm, being sold on a mortgage foreclosure was bid off for \$2,400, by W., who agreed, orally, with the plaintiff to let him have the farm back on the payment of said sum of \$2,400, and the sum of \$20 in addition for expenses. The plaintiff failing to procure the money, or

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security, within the time limited, got an extension of time, and within the extended time, procured the defendant to take a conveyance from W. upon the terms upon which W. had agreed to convey to the plaintiff; and it was then agreed, by parol, between the parties, that the plaintiff should remain in possession, and receive the rents and profits, and with them, and from other sources, refund to the defendant what he had paid, or should pay or secure to W., and that on such payment, the defendant should convey the premises to the plaintiff.

Held, that the agreement of the defendant to convey the premises, being by parol, was void by the statute of frauds, and could not be enforced in equity. (*Loomis* agt. *Loomis*, 60 Barb., 22.)

4. *Held*, also, that the plaintiff having, at the time of making the agreement, no title or interest in the premises, and there being no legal consideration received from him, for the promise made by the defendant, that was another difficulty thrown in his way by the statute of frauds. (*Id.*)

5. A contract by which one person agrees to make, for others, three or four models of a mower, at once and without delay, means that the work shall be done as soon as it can reasonably be performed by the contractor. (*Sharpe* agt. *Johnson*, 60 Barb., 144.)

6. The legal nature and character of such a contract is not for the sale and delivery of the models by the contractor, but for work labor and materials to be done and furnished by him for the employers. (*Id.*)

7. Before a party can recover upon a contract, he must show that he has performed on his part. If, in his complaint, he counts simply for work and labor, the other party may defeat the action by setting up as a defense, and proving, that the work and labor was done in pursuance of a contract between the parties, which has not been performed by the plaintiff. (*Id.*)

8. The plaintiff received a lamb, as a gift from her mother, who at the same time made an agreement with H. to keep the same for the plaintiff, upon the terms of giving the latter all the increase, and H. to have all the wool, for the keeping. The increase amounted, in six years, to some seventeen sheep, which were

levied upon by the defendant, as the property of H.

Held, that H. had no title to the sheep, but was merely a bailee thereof. That he had no title to the wool, until he had performed his entire contract by keeping the sheep until shearing time. That for the entire performance of the contract, on his part, he would be entitled to the consideration promised, to wit, the wool; but that a part performance only, gave no title; and the defendant took by his levy no other or better title than H. had.

Held, also, that the title to the sheep was in the plaintiff. (*Hasbrouck* agt. *Boston*, 60 Barb., 413.)

9. Upon a sale of hides by the plaintiffs to the defendant, through a broker, the bought and sold note was as follows: "New York. Feb. 19, 1859. Sold for account of D. G. and W. B. Bacon, to Mr. W. W. Gilman, 4,045 Singapore and Penang Cow Hides, per Samuel Appleton. No allowance except for sea damaged. Price 12 cents per pound, cash."

Held, that the contract was for the purchase of all the hides, at the price of 12 cents per pound, subject to a deduction from the price, at the usual and fair rate, for any of the hides that were sea damaged. *Bacon* agt. *Gilman*, 60 Barb., 640.)

See FORECLOSURE SUIT. (*Id.*)

FRAUD. (*Id.*)

TENANTS IN COMMON. (*Id.*)

VENDOR AND PURCHASER. (*Id.*)

CONTRACT. (4 *Lansing*)

ALIENS.

See LITERARY PROPERTY. (47 *N. Y.*)

1. Aliens named in the act of November 26, 1827 (Sess. Laws, chap. 5, p. 7), who failed to obtain naturalization for six years after its passage, were excluded from its benefits; and, obtaining naturalization after the expiration of the six years, their property became subject to law of descent prescribed by the Revised Statutes. (*McCarty* agt. *Deming*, 4 *Lansing*, 440.)

ALIEN ENEMY.

See CONTRACT. (4 *Lansing*).

ALIMONY.

See DIVORCE. (60 Barb.)

APPEAL. (4 *Lansing*).

EVIDENCE. (*Id.*)

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EXECUTION. (*Id.*)
ORDER OF COURT. (*Id.*)

ALTERATION OF CONTRACT.

See LEASE. (4 *Lansing.*)

AMENDMENT.

See PLEADINGS. (4 *Lansing.*)
PRACTICE. (*Id.*)

ANIMALS.

See TRESPASS. (46 *N. Y.*)

1. There is not known in practice, and cannot be in law, such a union of interest or title, or partnership, in animals, as that one party shall own the carcass, and the other the wool, the hair or the feathers. (*Hasbrouck* agt. *Bouton*, 60 *Barb.*, 413).

See CONSTITUTIONAL LAW. (46 *N. Y.*)

ANSWER.

See PLEADINGS. (60 *Barb.*)

1. A general denial, now, like the general issue under the former practice, puts in issue the existence, at any time, of the cause of action alleged in the complaint, and admits of evidence tending to establish such defense. (*Evans* agt. *Williams*, 60 *Barb.*, 346).
2. If a cause of action has once accrued or existed, and has been satisfied, or has been satisfied, or defeated, by reason of something which has accrued subsequently, that is new matter, which must be pleaded, in order to render it competent as evidence. (*Id.*)

See EQUITY. (60 *Barb.*)
GENERAL ISSUE. (*Id.*)

APPARENT TITLE.

See ESTOPPEL. (46 *Y. Y.*)

APPEAL.

1. The word "may" in sec. 177 of the Code is permissive, not mandatory; and the right to set up new matter by supplemental pleading, is not absolute, but is within the discretion of the court. An order, therefore, denying such right is not appealable to this court. (*Medbury* agt. *Swan*, 46 *N. Y.*, 308.)
2. Plaintiff demurred to two counts of defendants' answer. The demurrer was sustained; and from the order sus-

taining demurrer, defendants appealed, but without giving security or obtaining a stay. Plaintiff thereupon noticed the cause, took an inquest at the circuit, and perfected judgment. This judgment was, upon defendants' motion, set aside. From the order setting it aside, plaintiff appealed: defendants moved at a General Term (one of the members of which was the justice who granted the order), to dismiss the appeal upon the grounds that the order was an appealable one; also, that plaintiff had waived his appeal by appearing, and, without objection, arguing the appeal from the order sustaining the demurrer. The appeal was dismissed. From the order of dismissal, an appeal was brought to this court:

Held, 1st. That as under sec. eight of article six of the State Constitution, the General Term, as constituted, had no power to review the order or to entertain the question, whether it was an appealable one, it must be assumed that only the question of waiver was entertained and passed upon. 2d. That the plaintiff's appearance and argument of the appeal from the order sustaining demurrer, was no waiver of appeal from the order setting aside inquest and judgment. 3d. That this court will not examine into the merits of the Special Term order appealed from, as it has not been reviewed upon its merits by the General Term. (*Pastor* agt. *Hayfield*, 46 *N. Y.*, 249.)

3. The right of a party in a case tried by a referee, to have separate findings of fact and conclusions of law, is a substantial one. (*Van Slyke* agt. *Egat*, 46 *N. Y.*, 260.)
4. Where a referee has failed to pass upon material questions of fact and law, the proper practice is to apply to the court to send the case back to the referee, to pass specifically upon such questions or to re-settle his report. Should the application be denied, upon an appeal from the judgment, the proceeding to obtain further findings can be inserted in the record, and the materiality of the findings asked for, can be determined at General Term or in this court upon the appeal. In such a case the presumption, that all material facts of which there was evidence have been found against the appellant, will not apply in respect to those matters as to which he has sought to obtain specific findings, but they will be regarded in the same manner as facts, which, upon trial, the court has refused to submit to the jury. (*Id.*)

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5. Plaintiff, instead of adopting this course, moved to set aside the report, "or for such other or further order as should be proper;" which motion was denied:

Held, that the order did not necessarily dispose of the right of plaintiff to further findings, but was simply a ruling upon a question of practice, as to the mode of obtaining relief; that it was discretionary with the court to grant the appropriate relief, under the words in the notice "for such other and further order," etc., and that the order was not appealable. (*Id.*)

6. There is no sufficient ground in any case for entertaining an appeal in this court before judgment from an order in respect to findings. (*Id.*)

7. Upon an appeal to the General Term from an order confirming the report of a referee, on proceedings to obtain surplus moneys arising on foreclosure sale, which order gave the entire surplus moneys to the executor of the lessor, the court set aside the report and referred the case back, and in the order directed, that the share of the lessee should be ascertained, by computing the value of the residue of his term in the surplus, deducting therefrom the amount of the payments to be made by him under the lease. Upon the second hearing evidence was received, under objection on the part of the executors, as to the annual rental value of the premises. The executors, relying on the decision of the General Term, offered no evidence thereon:

Held, that the executor had a right to repose upon their objections, as the case then stood, and the matter should be referred back, to give them an opportunity of adducing evidence upon the question of the value of the term. (*Olarkson agt. Skidmore*, 46 N. Y., 297.)

8. Appeals to this court under sec. 11 of the Code are confined to actual determination of the various courts named, made at General Term. A judgment entered upon, and in conformity with a remittitur from this court, is not an actual determination of the court below. Its duty and power simply was to enforce the judgment of this court as prescribed in sec. 12. The remittitur was equally controlling upon the General Term, and left nothing to be determined by it. (*Wilkins agt. Earle*, 46 N. Y., 358.)

9. An order of the General Term granting a new trial upon questions of fact, in a case tried by jury, is not appeal-

ble. (*Wright agt. Hunter*, 46 N. Y., 409.)

10. Where the case was tried by jury and the return shows that questions of fact were legitimately before the General Term, and that the new trial may have been granted upon questions of fact, the appeal will be dismissed. (*Id.*)

11. An appeal from an order granting a new trial, with the stipulation required, of judgment absolute in case the order is sustained, is only proper and admissible when the sole question that can be presented upon the record, relates to and will determine the merits of the controversy and cannot be obviated upon a second trial. Where there are exceptions which, if sustained, will entitle the successful party to a new trial, but the decision of which will not necessarily determine the merits, the exceptions must be clearly frivolous to justify the hazard of such an appeal. (*Cobb agt. Hatfield*, 46 N. Y., 533.)

12. An order made at General Term reversing a judgment absolutely, without granting a new trial, cannot be appealed from as an order. To review it, judgment should be perfected thereon, and an appeal taken from the judgment. The order alone is not a judgment. (*Mehl agt. Vonderwulbeke*, 46 N. Y., 539.)

13. Plaintiff in his complaint in an action upon a contract for the sale of lands, asked judgment directing a specific performance; or in case a conveyance was impracticable, damages for the non-performance. Defendants, to whom the lands in question had been conveyed, entered as much of the judgment as denied a specific performance, and plaintiff entered the portion in his favor, and appealed from the former part:

Held, that the provisions of the judgment are connected and dependent, that the part appealed from should not be reversed without a reversal of the other; that plaintiff's entry of the part of the judgment in his favor, and taking no appeal therefrom, gave the court no authority to reverse it, and was an election to accept it, and a waiver of his right to appeal. Appeal therefore dismissed. (*Murphy agt. Spaulding*, 46 N. Y., 556.)

14. Sections 262 and 272 of the Code which provide that a judgment shall not be deemed to have been reversed upon questions of fact, unless so stated

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- in the order of reversal, apply only to cases tried by the court and a referee, and not to cases tried by jury. If it appears in the latter case that the order granting a new trial was, or may have been granted upon questions of fact, this court will not entertain an appeal. (*Sands* agt. *Crooks*, 46 N. Y., 564.)
15. If exceptions appear in the case, which were well taken, the court would be justified in rendering judgment absolutely for respondent, and they will only be examined for the purpose of determining whether such judgment shall be rendered or the appeal dismissed. (*Id.*)
16. An order denying a motion for a new trial on the ground of newly discovered evidence, cannot be reviewed upon the merits in this court. But where it appears that the merits of the application were not considered by the court below, from an erroneous supposition of want of power, and that the order was based upon that ground, it is appealable, and will be reversed in this court. It is incumbent upon the appellant, however, to show this affirmatively. (*Tracy* agt. *Almyer*, 46 N. Y., 598.)
17. In an action upon a bond, where it appears on the face of the complaint that such bond was void, because taken by a judicial officer in a proceeding of which he had no jurisdiction; the Supreme Court at General Term has power to reverse a judgment for plaintiff, for the error appearing upon the record, although no exception were taken upon the trial. (*Voss* agt. *Ock-Boft*, 44 N. Y., 415 distinguished.) (*Brookham* agt. *Hamill*, 46 N. Y., 636.)
18. Since the Code this court has no more power to review a question of fact in an equity suit than in an action at law. (*Haight* agt. *Williams*, 46 N. Y., 683.)
- See FINDINGS OF FACT AND CONCLUSIONS OF LAW. (46 N. Y.)
- JURISDICTION. (*Id.*)
- JUDICIAL NOTICE. (*Id.*)
19. An order judging defendant in contempt, and prescribing a punishment, is an order made in a special proceeding, and affects a substantial right, and if final is appealable to this court. (*Brinkley* agt. *Brinkley*, 47 N. Y., 40.)
20. If, however, the order is conditional and the punishment is not inflicted absolutely, but it is in the power of defendant to avert it, it is not a final order, and is not appealable. (*Id.*)
21. The General Term, upon appeal from order of Special Term, has the same power to grant affirmative relief to the party opposing the motion, as is possessed by the Special Term. (*Bennett* agt. *Lake*, 47 N. Y., 93.)
22. A party alleging error holds the affirmative in the appellate court, and must be able to show it specifically. If a question is asked a witness, capable of a construction which makes it competent, a general objection will not be regarded, although the question is capable of a construction which may render it incompetent. (*Bryant* agt. *Trimmer*, 47 N. Y., 96.)
23. No appeal lies to this court from an order of the General Term of the Supreme Court, made upon an appeal from an order in an action in the County Court. (*Younghouse* agt. *Figar*, 47 N. Y., 99.)
24. The judge upon trial charged, that if the jury should find the facts precisely as defendants' witnesses testified, still they were liable, and, thereupon, directed the jury to find a verdict for the plaintiffs. To which defendants' counsel excepted.
- Held*, that it was not necessary to request the court to submit any question of fact, in order to enable defendants to raise the question upon appeal as to the correctness of the charge and direction. (*Low* agt. *Hall*, 47 N. Y., 104.)
25. An order setting aside the verdict of a jury upon issues ordered to be tried in an equity action, is within the discretion of the court. The mode of trial of such an action, as limited by sec. 254 of the Code, is likewise a matter of discretion. An order, therefore, setting aside issues already tried, and directing other issues to be settled by a referee, and to be tried by a jury, is not appealable to this court. (*Colis* agt. *Tift*, 47 N. Y., 119.)
26. The cases in which this court can look into the evidence upon a trial by the court or a referee, with the view of determining whether the questions of fact are properly decided, are only such as are made exceptions to the general rule by statute. (Code, §§ 268, 272.) (*Field* agt. *Munson*, 47 N. Y., 221.)
27. Where, upon the rendition of a verdict at circuit, an order is made pursuant to sec. 265 of the Code, giving the defeated party time to

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- make a case and exceptions, and to move for a new trial in the first instance at the General Term, and in the meantime suspending judgment; and where, upon motion for new trial, the General Term denies the same without directing judgment upon the verdict; upon the entry of judgment an appeal can be taken therefrom direct to this court. Such a judgment is, in legal effect, the action of the General Term, as it resulted from and was dependent upon its order, which order gave the legal right to enter judgment, the same as if it had so expressly directed. (*Van Bergen agt Bradley*, 34 N. Y., 315, and other decisions based thereon, overruled. (*Caughey agt Smith*, 47 N. Y., 244.)
28. An appellate court will not seize hold of isolated portions of a charge for the purpose of discovering error. If the charge, as a whole, conveys to a jury the correct rule of law upon a given question, the judgment will not be reversed. If the language used is capable of different constructions, that one will be adopted which will lead to an affirmation of the judgment, unless it fairly appears the jury were, or at least might have been, misled. (*Caldwell agt The N. J. Steamboat Co.*, 47 N. Y., 282.)
29. After the testimony in a case has closed, it is discretionary with the court whether to open the case or not, to receive additional evidence, and the decision is not reviewable here. (*Id.*)
30. Where, upon a trial before a referee, the plaintiff at the close of his evidence is nonsuited and duly excepts, a question of law is raised upon which it is competent for the General Term to reverse the judgment if the decision was erroneous, it is a decision that, as a matter of law, there is no evidence to sustain the complaint; and if the evidence, although insufficient to constrain the referee to find for the plaintiff, is such as would have required the submission of the question to a jury, and would have been sufficient to sustain a finding for plaintiff, it is error. (*Seafeld agt Hernandez*, 47 N. Y., 313.)
31. Questions as to the amount of damages cannot be reviewed in this court, but only the question whether any, or more than nominal damages, are recoverable. (*Ihl agt The Forty-second Street and G. S. F. E. E. Co.*, 47 N. Y., 317.)
32. A question decided in this court, after full argument and deliberation, will not be reviewed, unless there has been some plain mistake, as in overlooking some statutory provision or some controlling decision, such as would require the court to grant a reargument. (*Baton agt Alger*, 47 N. Y., 345.)
33. Where the court has acquired jurisdiction of the subject matter of an action or proceeding, it has jurisdiction to render judgment, and if error is committed, the judgment is voidable, not void, and the remedy of the party aggrieved is by appeal. It is only where a judgment is void that a party has an absolute legal right to have it set aside or vacated upon motion. An order, therefore, denying a motion to set aside a judgment in a case where the court below had a jurisdiction, is not appealable to this court. (*Schattler agt Gardiner*, 47 N. Y., 404.)
34. There is no appeal from a decision made by the referee upon settlement of the case, nor will the introduction in the judgment roll, of papers showing that the referee had on the settlement of the case improperly refused to allow parts of the proposed case, raise any question which can be considered upon appeal from the judgment. An order directing a resettlement of a case is not appealable. (*Lefer agt Field*, 47 N. Y., 407.)
35. An order continuing or dissolving a temporary injunction, where it does not substantially dispose of the merits of the controversy, involves a question of discretion, and does not necessarily affect a substantial right. It is not, therefore, appealable to this court. (*Paul agt Munger*, 47 N. Y., 469.)
36. When a new trial has been granted in an action tried by a jury upon a record presenting questions of law only, and the record presents no question or exemption upon which the order could be sustained in this court, except such as if decided adversely to the party complaining would be conclusive against him, so that in no aspect could his case be varied or put in better form upon a retrial, an appeal to this court is proper and advisable, but not otherwise. (*Dickson agt B. and Seventh Av. R. R. Co.*, 47 N. Y., 501.)
37. Where the court below may have granted a new trial upon questions of fact, the decision is not reviewable in this court. (*Id.*)

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33. On appeal to this court, resort cannot be had to the evidence for the purpose of establishing error in the conclusions of law; such error must be made to appear from a comparison of the conclusions, with the facts found or admitted on the record. (*Baker* agt *Spencer*, 47 N. Y., 562.)
39. Where various requests are made to the court below to charge, some of which are substantially complied with in the charge, a general exception to the refusal to charge each of the requests submitted, except so far as embraced in the charge delivered, and to every part of the charge which is inconsistent with such requests, presents no question for review in this court. (*Ayrault* agt *Pacific Bank*, 47 N. Y., 570.)
40. Where, after the obtaining of a judgment by two partners plaintiffs, and an appeal therefrom by defendant, one of the partners dies, and upon motion an order is granted substituting the personal representative of the deceased partner as plaintiff in his stead, the appeal to this court from the judgment does not bring up such order for review; it is not an intermediate order involving the merits and necessarily affecting the judgment, (Code, § 11, sub. 1. *Hackett* agt *Belden*, 47 N. Y., 624.)
41. On appeal to the General Term, the judgment may be reversed for error appearing on the record, but upon appeal to this court only actual determinations of the General Term can be reviewed, (Code, § 11.) Where, therefore, a judgment entered upon an order of the general term does not conform to that order, the proper remedy is by motion in the Supreme Court to correct the judgment, and not by appeal to this court in the first instance. (*Id.*)
42. An action commenced in one of the district courts of the city of New York, and removed to the Common Pleas of that city pursuant to sec. 37 of chap. 344, Laws of 1857, permitting actions to be so removed where the claim or demand exceeds \$100, is an action commenced in Justices' Court, and is not appealable to this court, unless the General Term from whose judgment the appeal is brought shall by order allow such appeal as prescribed by sec. 11, subdivision 3 of the Code. (*Heinrich* agt *Kom*, 47 N. Y., 658.)
43. A general term order granting a new trial on a traverse of an inquiry of forcible entry and detainer is not appealable; it is an action. (*Peoples ex rel. agt McManus*, 47 N. Y., 661.)
44. An order sustaining or overruling a demurrer is not appealable to this court. (*Peoples ex rel. agt Benedict*, 47 N. Y., 667.)
45. An order setting aside the assessment of a sheriff's jury and granting a new assessment of damages, is not reviewable in this court. (*Samuels* agt *Bryant*, 47 N. Y., 674.)
46. The court of original jurisdiction may, in its discretion, require the plaintiff in an action, suing as an executor, administrator, or trustee of an express trust, to give security for costs under sec. 317 of the Code, at any time during the pendency of the action, either before trial and judgment, or pending an appeal to the general term of the court from a judgment. The court may require such security for the costs already accrued or entered on the judgment appealed from as well as those that shall thereafter accrue, or limit the requisition to the costs that shall accrue in the future. The discretion of the court of original jurisdiction is not reviewable in this court. (*Gedney* agt *Purdy*, 47 N. Y., 676.)
47. An appeal from an order or decree of a surrogate without filing a bond as security for respondent's costs, as required by sec. 108, title 3, chap. 9, part 3 of the Revised Statutes (2 R. S., 610), is ineffectual for any purpose; and after the expiration of the time limited for appeal, it is not in the power of the court to grant any relief (*In re Dumensil*, 47 N. Y., 677.)
48. Upon motion to dismiss such an appeal, the court has no power to annex any conditions to the dismissal. (*Id.*)
- See COSTS. (47 N. Y.)
JURISDICTION. (*Id.*)
MOTIONS AND ORDERS. (*Id.*)
48. An appeal does not lie from a judgment entered upon an award of arbitrators, solely on a case containing the testimony taken before the arbitrators and a copy of the judgment roll. (*Dibble* agt *Camp*, 60 Barb., 150.)
49. If a party feels aggrieved by the award, his only remedy is to move the court at special term, either for an order modifying the award, or for an order vacating it; upon the grounds, and in the manner provided by the

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Revised Statutes. (2 R. S., 542, §§10, 11). (*Id.*)

See COMMON SCHOOLS. (60 Barb.)
CONSTITUTIONAL LAW. (*Id.*)
COURT OF APPEALS. (*Id.*)
CRIMINAL LAW. (*Id.*)

50. An appeal lies to the general term from a special term order, confirming the report of commissioners of estimate and assessment for land taken for public parks in New York city, and although the act of 1813 (chap. 86, § 178), makes the report, when confirmed by the supreme court, final and conclusive (*Matter of Commissioners of Central Park, 4 Lansing, 467*).

51. The power to estimate the loss and damage to lands taken for parks, &c., in New York, as given, by the act of 1813 (chap. 86 § 176), to the commissioners solely; the court may refer back to the commissioners, with directions to allow for land omitted by them, but directions to allow for land according to estimates made by the court are erroneous. (*Id.*)

52. The general term may entertain an appeal from an order, fixing an amount of alimony in an action for divorce, and it seems may order a reference to ascertain what allowance therefor is suitable. (*Galinger agt. Galinger, 4 Lansing, 473*.)

See EVIDENCE. (4 Lansing.)
JUSTICE OF THE PEACE. (*Id.*)
PRACTICE. (*Id.*)
RELIGIOUS CORPORATIONS. (*Id.*)

APPEALABLE ORDER.

See APPEAL. (4 Lansing.)

APPEARANCE.

See HUSBAND AND WIFE. (4 Lansing.)

APPOINTMENTS.

See CONSTITUTION. (47 N. Y.)

APPRAISAL OF DAMAGES.

See CONSTITUTIONAL LAW. (60 Barb.)

ARBITRATION AND AWARD.

See APPEAL. (60 Barb.)
BRIDGES. (4 Lansing.)

ARBITRATOR.

See CONTRACT. (46 N. Y.)

ARREST.

See JUDGMENT. (60 Barb.)
MENACES. (*Id.*)
PROMISSORY NOTES. (*Id.*)

1. A creditor's action against the assignee for creditors of his debtor, in behalf of himself and other creditors in the same relation, who may come in and contribute to the expenses of suit, for an accounting and distribution of the funds chargeable to the assignee, is not within subdivision 2 of section 179, of the Code, "an action for money received" in "a fiduciary capacity," in which the defendant may be arrested. (*Roberts agt. Prosser, 4 Lansing, 369*).

ASSAULT AND BATTERY.

1. Where in an action of assault and battery, for forcibly expelling the plaintiff from defendant's premises, it is a question for the jury to determine, from the evidence whether the defendant had actual possession of the premises, giving him the right of such expulsion, where the evidence was uncontradicted that the defendant's son with his family occupied the premises, but under an arrangement with the defendant that the latter was to keep possession of the farm and premises and provide all the materials and necessaries for living, and pay his son a stated salary per year for his services on the place. (*Comstock agt. Dodge, ante, 97*.)

2. Where the jury, under the charge of the judge, are prohibited, from passing upon the question, an exception to such charge on that point is well taken. (*Id.*)

3. Where the defendant in such action has died since the trial, and the cause of action not being one that survives a new trial should not be ordered, nor no trial of the issue can again lawfully take place. (*Mason, J. dissenting*). (*Id.*)

4. While it is well settled, in an action for assault and battery, evidence of acts done or words spoken by the plaintiff long before the cause of action arose, is inadmissible for the purpose of showing provocation and mitigating the damages, yet when such acts or words are a portion of a series of provocations frequently repeated, and continued down to the time of the assault, they may be proven. (*Stellar agt. Nellis, 60 Barb., 524*.)

ASSENT.

See HUSBAND AND WIFE. (46 N. Y.)

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ASSESSMENT ROLLS.

See ASSESSORS. (4 Lansing.)
RAILROAD MUNICIPAL BONDS.
(*Id.*)

ASSESSMENTS.

1. Under the charter of the city of Lockport, an objection to an assessment for the repair of a sewer, which extended the repair a distance of sixty feet beyond which the ordinance directed, *held*, not sustainable: (*Webber* agt. *The City of Lockport*, ante. 368.)
2. *Held*, also, that the objection that the work could not be done except by contract, and after receiving proposals, was not well taken: (*Id.*)
3. *Held*, also that the objection that the work could not be done until after an assessment for its cost was unavailable: (*Id.*)
4. *Held*, also that the objection that the territory benefited, &c., was not sufficiently described in the ordinance, was untenable: (*Id.*)
5. *Held*, also that the objection that the principle on which the assessment was made was wrong and unjust, was unavailable: (*Id.*)
6. *Held*, that the objection that a large amount of property stated in the return to be of the value of \$24,000, was not assessed at all, for the reason that it was doubtful whether it could be assessed—being mostly, school, church and city property, was fatal to the assessment: (*Id.*)
7. *Held*, also that the objection that in many cases the parcels of real estate attempted to be assessed, were so imperfectly described that they could not be sufficiently identified, was also fatal to the assessment. (*Id.*)
8. The provision of section seven of the charter of the city of New York of 1857 (Session Laws of 1857, chap. 446, § 7), prohibiting the passing of, or adoption of, certain resolutions by the common council, until two days after the publication thereof, in all the newspapers employed by the corporation, is mandatory; and an ordinance or resolution, not so published, is void, and an assessment in pursuance thereof invalid. (*In re Douglas*, 46 N. Y., 42.)
9. The term "lands," are used in the statute in relation to assessment and taxation (1 R. S. 360 §§ 1, 2), includes such an interest in real estate as will protect the erections or affixing, and possession of buildings and fixtures thereon, though unaccompanied by the fee; and such an interest, with the buildings and fixtures, may be assessed to the owner thereof. (*The People ex rel. agt. Casity*, 46 N. Y., 46.)
10. Under the provisions of sec. 38 of the charter of the city of New York, 1857, where an improvement is directed, embracing several kinds of work, which may be performed separately and by different parties, some of which are patented and others not, separate proposals should be invited for that part which is not patented, and for which there can be no competition. An advertisement inviting proposals for work united is defective, and the assessment founded thereon irregular. (*In re Elger* et al., 46 N. Y., 100.)
11. It is not error to graduate the contract price for the work, according to the time employed in doing it. (*Id.*)
12. Neither is it error to include in the assessment the whole amount of the commission to be paid the collector. (*Id.*)
13. A rural cemetery association, incorporated under chap. 133, Laws of 1847, is the legal owner in fee of the lands, purchased for the purposes of the association. One to whom a cemetery lot is conveyed for burial purposes, takes under the statute, simply a right to use it for those purposes. No such estate is granted, as makes him an owner in such sense, as to exclude the general proprietorship of the association. In an assessment, therefrom, for local improvements, it is proper to assess the whole premises to the association. (*Bufile City Cemetery* agt. *City of B.*, 46 N. Y., 503.)
14. Statutes conferring exemptions from taxation are to be strictly construed. The provision of sec. 10 of the act providing for the incorporation of rural cemetery associations (chap. 133 Laws of 1847), which exempts the lands and property of such associations, from "all public taxes, rates and assessments," does not apply to a municipal assessment to defray the expenses of a local improvement. (*Id.*)
15. Under the provisions of the act in relation to sewerage and drainage in the city of New York (Laws of 1865, chap. 381), the devising of a plan for

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- the drainage of the entire city is not a condition precedent to the power of contracting for the doing of the work in any of the sewerage districts. (*In re N. Y. P. E. Pub. School*, 47 N. Y., 556.)
16. The provision of sec. 4 of said act, requiring the Croton Aqueduct Board to file a copy of the map showing the plan of drainage of the sewerage districts with the clerk of the common council, in the absence of any provision prohibiting the contracting of the work, until the filing of such copy, is directory only, and the omission so to do does not vitiate the assessment. (*Id.*)
17. The power of apportionment is included in the power to impose taxes, and is vested in the legislature; and in the absence of any constitutional restraint, the exercise by it of this power cannot be reviewed by the courts. (*Gordon agt. Cornes*, 47 N. Y., 608.)
18. Where a tax is imposed upon a particular locality to aid in a public purpose, which the legislature may reasonably regard as a benefit to that locality, as well as to the State at large, inequality in the apportionment of the expenses of the undertaking, with reference to the benefits resulting to the State and the locality, cannot be alleged for the purpose of impugning the validity of the act. (*Id.*)
19. The extent to which the trustees of the village of Brockport may have deemed it their duty, under the act entitled "An Act in Relation to the Establishment of a Normal and Training School in the Village of Brockport," (chap. 96, Laws of 1867), to revise and correct the assessment roll, does not affect their jurisdiction to levy the tax; and questions as to such revision and correction cannot be raised in an action of trespass against them. (*Id.*)
- See CONSTITUTIONAL LAW. (47 N. Y.)
BUFFALO U. I. WORKS *agt. CITY*
OF B. (mem.) (47 N. Y., 671.)
20. Although the omission to advertise for bids or sealed proposals for crosswalks to be laid or relaid, when such crosswalks are embraced in the resolution of the common council for paving an avenue, is a legal irregularity, under the act of 1858, (Laws of 1858, ch. 338), yet under the provisions of section 27 of the act of 1870, chapter 382, it is not necessarily fatal to the assessment; as the assessment may be modified, by deducting therefrom the amount of the unlawful increase. (*Matter of McCormack*, 60 Barb., 128.)
21. The objection that, in paving an avenue, the space between the rails of a railroad company was not paved, relates to an omission of which property owners cannot complain, since by such omission their burden is lessened. It is not a legal irregularity, within the meaning or spirit of the act of 1858, and fatal to the assessment. (*Id.*)
22. The acts of the assessors, while in the lawful discharge of their duty, cannot be reviewed by proceedings under the act of 1858, although the assessors were governed, in their deliberations, by an erroneous principle. (*Id.*)
23. Although the report of the commissioners, when confirmed, is final and conclusive, in regard to the estimates and awards, it is not conclusive upon the rights of claimants *inter sese*. The statute allows an action to be brought against the person to whom the award is made, after payment thereof to him, by the person to whom of right the money paid belongs, notwithstanding the report. (*Id.*)
24. Where an ordinance of the common council of the city of New York, directed an avenue to be curbed and guttered, and the sidewalks to be flagged, without directing that new flagging should be used:
Held, that it is no objection to the assessment that a part of the old flagging was relaid, and the old curb reset, the expense of the labor, only, being charged. (*Matter of Anderson*, 60 Barb., 375.)
25. Nor is it an objection to the assessment that the lots are charged for the work done opposite each lot, while the expenses are charged on all the property, per foot, equally. (*Id.*)
26. When objections are made by a person assessed, to an assessment for a local improvement in the city of New York, and are disallowed by the assessors, it is the duty of the assessors to present such objections, with the assessment, to the board of revision, for the purpose of enabling that board to correct the errors, if any, of the assessors. (*Matter of Drumm*, 60 Barb., 377.)
- See CONSTITUTIONAL LAW. (60 Barb.)
CORPORATIONS. (*Id.*)
MUNICIPAL CORPORATIONS. (*Id.*)

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ASSESSORS.

1. Assessors who have assessed a non-resident of their town for personal property, are individually liable to him for damages arising on account of a sale of his property for collection of the tax levied pursuant to the assessment (*Wadsw. agt. Matheson*, 4 *Lansing*, 158.).

ASSETS.

See EXECUTORS AND ADMINISTRATORS. (4 *Lansing*.)

ASSIGNEE OF JUDGMENT.

See JUDGMENTS. (4 *Lansing*)
NOTES AND BILLS. (*Id.*)

ASSIGNEE OF LEASE.

See LEASE. (4 *Lansing*.)

ASSIGNEE FOR BENEFIT OF CREDITORS.

See ARREST. (4 *Lansing*.)

ASSIGNMENT.

1. The law presumes, as against a debtor, in the absence of proof to the contrary, that an assignment of the demand against him was made with due authority and upon a good consideration; also, that it is fair rather than fraudulent. The fact, therefore, that an assignment by a president of a bank was in consideration of a private indebtedness on his part to the assignee, is not sufficient to raise a presumption in favor of the debtor, that the assignment was without authority and in violation of duty, and does not affect the validity of the assignment. (*Belden agt. Meeker*, 47 *N. Y.*, 307.)
 2. An assignee of a mortgage, although a *bona fide* holder, takes the same subject to all defenses existing between the original parties. (*Ingraham agt. Disborough*, 47 *N. Y.*, 421.)
- See* BANKRUPT LAW. (47 *N. Y.*)
PARTNERSHIP. (*Id.*)
RECORDS. (*Id.*)
VENDOR AND PURCHASER. (60 *Barb.*)
3. An order upon the holder of funds cannot be made to operate as an equitable assignment by reason of an intention of the drawer not imported by its language. (*Butler agt. Ellwanger*, 4 *Lansing*, 8).

See EVIDENCE. (4 *Lansing*.)

ASSIGNMENT OF JUDGMENT.

See JUDGMENTS. (4 *Lansing*.)

ASSIGNMENT OF LEASE.

See LEASE. (4 *Lansing*.)

ASSOCIATIONS.

See DEVISE. (46 *N. Y.*)

1. A member of a voluntary unincorporated association for pleasure purposes, cannot maintain an action in his own name upon a contract made with the association; nor has he an interest therein which he can so transfer that his assignee can maintain an action against the contractor with the association. Nor can one member maintain an action at law, in behalf of the association, against another member upon any agreement made with the association. (*McMahon agt. Krahr*, 47 *N. Y.*, 67.)

See FRAUD. (47 *N. Y.*)

BENEVOLENT SOCIETIES. (60 *Barb.*)

ATTACHMENT.

1. In an action of trespass for wrongfully taking and carrying away plaintiff's goods and breaking up his business, the attachments under which the goods was taken, having been set aside for irregularity, they afford no shield or protection whatever for such taking to the creditors who procured them to be issued. Such protection extends only to the officer while acting under them in the discharge of his public duty. (*Wehle agt. Butler*, ante, 5).
2. Where all the attaching creditors actively participated in the seizure and removal of plaintiff's entire stock at one and the same time, without separating their respective proceedings, and there being no evidence from which the extent of the separate liability of any one of them could be ascertained, they must be deemed, for the purposes of the case, to have been joint tortfeasors, and as such their liability is joint and several, and enforceable accordingly at plaintiff's election. (*Id.*)
3. Where a portion of the attaching creditors only, were sued in this action, the bare fact of the existence and simultaneous, but fruitless levy of the attachments issued by the other creditors, cannot be made available to the defendants in this action in any aspect of the case. (*Id.*)

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4. All the attaching creditors having been jointly concerned in the commission of a wrong, and being jointly and severally liable therefor at plaintiff's election, they were all alike incapacitated from making a subsequent legal appropriation of plaintiff's property, either for their joint account, or for account of any one of their number, without plaintiff's assent. (*Id.*)

5. If evidence of a subsequent legal appropriation to plaintiff's use was competent, it cannot be received on the trial in this action, not even in mitigation of damages without being *pleaded*. (See *Wehle* agt. *Haviland*, 42 *How.*, 399.) (*Id.*)

6. An action cannot be commenced in the *maritime court* of the city of New York (nor in a justice's court) against a *resident defendant*, by *short attachment*. (*Haviland* agt. *Wehle*, *ante*, 59.)

See JUDGMENT. (60 *Barb.*)
JUSTICE OF THE PEACE. (4 *Lansing*.)

ATTORNEY AND CLIENT.

See PRACTICE. (4 *Lansing*.)

ATTORNEY GENERAL.

See ACTION. (4 *Lansing*.)

AUCTION SALE.

See CHATTEL MORTGAGE. (4 *Lansing*.)

AUTHORS.

See LITERARY PROPERTY. (47 *N. Y.*)

AVENUES.

See ASSESSMENT. (60 *Barb.*.)

B.

BAIL.

See CRIMINAL LAW. (60 *Barb.*.)

1. The death of a defendant in the principal action sixty-six days after service of the summons on his bail in an action to charge them, is no defense to the latter action. (*Gauntley* agt. *Wheeler*, 4 *Lansing*, 491.)
2. The twenty days to appear or serve an answer under the Code is a substitute for the return of the process mentioned in section 34, 2 R. S., p. 383. And it seems the latter section

is not repealed by section 191 of the Code. (*Id.*)

3. The service of the answer after the twenty days given by the Code, does not fix the time within which defendants sued as bail may be exonerated by the death of their principal. (*Id.*)

BAILMENT.

1. A bailee for hire, who uses the property contrary to the instructions of the bailor, is liable for a conversion thereof. Where property, in the exclusive possession of such bailee, is injured in a way that ordinarily does not occur without negligence, the burden of proof is upon the bailee, to show that the injury was not occasioned by his negligence. (*Collins* agt. *Bennett*, 46 *N. Y.*, 490.)

2. One having possession of personal property as a bailee for hire, with an executory and conditional agreement for its purchase, which conditions have not been performed, can give no title thereto to a purchaser, although the latter acts in good faith and parts with value, without notice of the want of title of his vendor. (*Austin* agt. *Dye*, 46 *N. Y.*, 500.)

3. The hirer of any thing is responsible for that degree of diligence which all prudent men use in keeping their own goods of the same kind. He is not only liable for his own personal default, but also for that of his servants, and persons employed by him. (*Hall* agt. *Warner*, 60 *Barb.*, 198.)

See AGREEMENT. (60 *Barb.*)

BANKRUPTCY.

1. In an involuntary case, the attorney for the petitioning creditor was allowed to be paid out of the fund in the hands of the assignee, not only his disbursements, but a reasonable compensation for his services in prosecuting the debtor into bankruptcy. (*Matter of Robinson*, *ante*, 25)
2. The practice in such case, is for the attorney to present to the register in charge a petition directed to the court in bankruptcy, praying to be allowed for such services and disbursements. The register then takes testimony touching the necessity and value of such services and disbursements, and certifies the same with his opinion thereon to the district judge who makes such order thereon as the testimony seems to warrant. (*Id.*)

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3. The mere fact of *relationship* in the ninth degree, or a less degree, on the part of a proposed *trustee* to a bankrupt or to a *creditor*—even the largest in amount of a bankrupt, or to a proposed member of the *committee* to such creditor or to the *bankrupt*—cannot be regarded as a disqualification, independent of any other facts which might concur with such relationship to make a confirmation of the resolution under section 43 of the Bankrupt act improper. (*This seems to overrule the decision in this same case. 40 Hav., 461.*) (*Matter of Zinn, ante, 64.*)
4. On application by an attorney for compensation out of the fund in the hands of the assignee, for services rendered by him at the request of an involuntary bankrupt in and about defending against the petition, preparing schedules, &c. *Denied.* (*In the Matter of Clark, ante, 70.*)
5. Upon the petition of an attorney to be paid for services rendered by him, out of the fund in the hands of the assignee, accompanied by the certificate of the register in charge that such services were beneficial to the estate, and that the amount claimed was reasonable and just, followed by the written approval of the assignee, the court will order payment accordingly. (*Id.*)
6. Marshal in a case of involuntary bankruptcy allowed \$2 50-100 a day for services of a custodian in charge of the goods seized, although the register finds that he should have boxed and stored the goods, and that such custodianship was unnecessary; marshal's claim for a *further allowance* under section 47 rejected. (*In the Matter of Hare, ante, 86.*)
7. A bill of items of an attorney's claim is not made evidence of the statements therein contained, merely upon the testimony of the attorney that he performed the services mentioned in the bill, and that they are worth the sum therein charged. (*In the Matter of Staff, ante, 110.*)
8. Creditors who object to the accounts of the assignee do not suffer any of the consequences of default by a non-appearance before the register at the auditing of the account. (*Id.*)
9. It is the duty of the register in auditing a bill for professional services and disbursements, to examine the items of accounts as to the necessity and value of the services, and the occasion, necessity and amount of the disbursements and how they came to be rendered and made, and whether they were proper items for such an amount, or whether they ought to be compensated through some other form of proceeding. (*Id.*)
10. A city marshal who levies an execution issued upon a judgment of a state court upon the property of the bankrupt, which levy is set aside as void by the bankrupt court as in violation of the bankruptcy act, has no lien upon the property levied upon, or the proceeds thereof, for the fees, poundings, &c., of such levy and payments thereof, out of the fund in the hands of the assignee, denied. (*In the Matter of Kempner, ante, 129.*)
11. *It seems*, that a judgment obtained before the filing of the bankrupt's petition, but with knowledge on the part of the judgment creditors that the debtor is insolvent, will be treated in bankruptcy as void under the act. (*Id.*)
12. *It seems*, that a judgment creditor who has proved his claim (the judgment) in the bankruptcy proceedings so submits it to the jurisdiction of that court, that the judgment stands as a simple contract claim stripped of all the variety with which the judgment of the state court has clothed it. (*Id.*)
13. The purpose and design of the *bankrupt law*, is to bring the property the bankrupt into the bankrupt court for administration; and that court is furnished with all needful power to liquidate and settle all liens thereon; and where there are adverse claims, which it is not appropriate or proper to litigate by summary inquiry and order, provision is made by giving jurisdiction to the district court, concurrently with the circuit court, for that purpose. (*Matter of Sacchi, ante, 250.*)
14. State courts have jurisdiction, it is true, to entertain bills for the foreclosure of mortgagees upon the real estate of a bankrupt, and may, no doubt, properly exercise that jurisdiction, if no objection is made. (*Id.*)
15. In general, mortgagees should not be permitted to pursue the estate of the bankrupt in the state court, but should come to the tribunal which, under federal laws, is charged with its administration. (*Id.*)
16. Upon a review by the circuit court of the decision of the district court, denying an application to remove the assignee in bankruptcy, on the ground of bad faith in the management of his

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trust, this court will deny the application, on the ground that the register and district court had all the proofs before them and their decision thereon adverse to his removal, should not be disturbed by this court. (*Id.*)

17. In this case, *held*, that it was either misapprehension on the subject, or a disregard of the proper views of the bankrupt law, that led the mortgagees into the state court for foreclosure, after the bankruptcy, and after the appointment of an assignee, and that the resistance to any withdrawal of the administration from the bankruptcy court, the proper tribunal, has resulted in bitter personal feeling, great and unnecessary delay, &c. (*Id.*)

18. Also *held*, that it appears, pending the controversy, the petitioner for the review has become the sole creditor of the bankrupt, and that no other property of the bankrupt has come to the assignee, except the mortgaged premises, and the bankrupt having united in the petition for the substitution of an assignee to be named by the petitioner, as such sole creditor, and the assignee, by his counsel on the argument of this review, declared his entire assent to such change: Therefore, no reason exists why the prayer of the petitioner to that extent should not be granted. (*Id.*)

19. While a suit was pending against a party, and after the testimony was all in and the case submitted to the referee for decision, but before any decision is made the party was declared a bankrupt. Soon after such bankruptcy, the referee decides the case in favor of the bankrupt, an application is now made to the register in charge to order the assignee of the bankrupt to pay the fees of the referee which have been incurred during the reference. (*Matter of Rosey, ante, 471.*)

20. Application reported against by the register and acquiesced in by the parties. (*Id.*)

21. It seems that it would be competent for the assignee to take up the report, at the expense of paying the fees of the referee, in case he should, in the exercise of a sound judgment, think it necessary in order to protect the estate from a renewal of the claim in question. (*Id.*)

BANKRUPT ACT.

A certificate of discharge issued under the bankruptcy act of 1867, cannot be impeached in a State court on the

ground that it was improperly granted. (*Ocean National Bank agt. Olcott, 46 N. Y., 12.*)

2. Laches in making an application for leave to plead a discharge in bankruptcy, is a sufficient ground for denying it. (*Medbury agt. Swan, 46 N. Y., 200.*)

See JURISDICTION. (46 N. Y.)

BANKRUPT LAW.

1. An assignee in bankruptcy acquires the equity of redemption of the bankrupt in his real estate, subject to an outstanding mortgage. (*Winslow agt. Clark, 47 N. Y., 261.*)

2. Where the mortgage is foreclosed without making the assignee in bankruptcy a party, his right to redeem is not impaired. He may enforce it as against the purchaser at the mortgage sale, at his grantor. (*Id.*)

3. The purchaser at the mortgage sale or his grantee becomes, as the assignee in bankruptcy, mortgagor in possession and is a necessary party to an action to redeem. (*Id.*)

4. The assignee in bankruptcy cannot maintain a personal action against the purchaser at the mortgage sale, for the value of the equity of redemption as upon a conversion. Such a case is not within the thirty-fifth section of the bankrupt law. (*Id.*)

BANKS AND BANKERS.

1. A bank is not authorized to pay a note of its depositor, made payable at the bank, and charge him with the amount thereof where the depositor, before the maturity of the note, has notified the bank not to pay it. (*Egerton agt. Fulton National Bank, ante, 216.*)

2. The relation of a bank with its depositors considered. (*Id.*)

3. The relation of banker and depositor, is that of debtor and creditor. Depositors on general account belong to the bank, and are part of its general fund. The bank becomes a debtor to the depositor to the amount thereof, and the debt can only be discharged by payment to the depositor, or pursuant to his order. Until actual payment, or acceptance by the bank of the depositor's check, or an assignment of the credit by the depositor, and notice to the bank, the deposit is subject to his order. The contract has none of the elements of a trust. For a breach on the part of a bank, of the obligation

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resulting from the relations between the parties, the depositor alone can sue. "The Florence Mills," having a balance of \$694 83 to its credit with defendant, sent to it on the 2d April, by mail, a check on another New York bank for \$4,895, accompanied by a letter containing this direction: "which (the check inclosed) please credit our account, and charge us our note of \$5,000, dne the 4th inst." The check was received and credited on account on the 3d, and, on the same day, defendant paid a past due note of \$5,000, of "The Florence Mills," payable at defendant's bank, and charged it on account. On the 4th, the note referred to in the letter, held by plaintiff, was presented, and payment refused:

Held, that the direction contained in the letter did not transfer the fund; that plaintiff acquired no title to it, and could not recover. (*Aetna National Bank* agt. *Fourth National Bank*, 46 N. Y., 82.)

4. Stockholders in a banking corporation are only personally liable, or their individual property chargeable for the debts of the corporation, to the extent, and as prescribed by the charter. By the act of becoming stockholders they assent to the terms, and assume the liabilities imposed by the act creating the corporation. The obligations thus assumed are limited by the terms of the charter, and cannot be extended by implication beyond the terms that instrument, reasonably interpreted. If a general personal liability is created, it may be enforced by a personal action, as other personal obligations are enforced. If the charter merely permits the individual property of stockholders to be levied, and taken upon execution, on a judgment against the corporation in a given contingency, and provides that the same process may be used and enforced by the stockholders, whose property is first taken, against the property of the other stockholders, so as to compel a ratable contribution by all, no general individual liability is created for which a personal action can be brought. In such a case the creditor of the corporation is confined to the remedy against the stockholders and their individual property given by the act. (*Lovry* agt. *Taman*, 46 N. Y., 119.)

5. Where the individual property of the stockholders is made liable for the debts of the bank, either absolutely or conditionally, and by a specified process, an indorsement upon the bills of the bank of the words, "individual property of the stockholders liable," is

but notice of the charter liability, and of itself gives no rights of action to the bill-holders against the stockholders, or against the president or cashier of the bank signing the bills officially. The bill-holders, by means of such indorsement, acquire no rights against the officers or stockholders, or their property, other than such as are given by the charter, with which all persons dealing with the corporation or receiving its obligations are supposed to be conversant. (*Id.*)

6. The provision of section 8, l R. 8., p 591, prohibiting the transfer of the assets of a moneyed corporation exceeding \$1,000, without a previous resolution of its board of directors, is not applicable to a banking association organized under the provisions of the general banking laws of 1838 (chapter 260, laws of 1838), and the various acts additional and amendatory thereof. (*Belden* agt. *Meeker*, 47 N. Y., 307.)

7. The law presumes, as against a debtor, in the absence of proof to the contrary, that an assignment of the demand against him was made with due authority, and upon a good consideration; also, that it is fair rather than fraudulent. The fact, therefore, that an assignment by a president of a bank was in consideration of a private indebtedness on his part to the assignee, is not sufficient to raise a presumption in favor of the debtor, that the assignment was without authority and in violation of duty, and does not affect the validity of the assignment. (*Id.*)

8. A bank receiving a promissory note for collection, whether payable at its counter or elsewhere, is liable for any neglect of duty occurring in its collection, by which any of the parties are discharged. (*Ayranlt* agt. *Pacific Bank*, 47 N. Y., 570.)

9. If the bank employs a notary to present the note, and to give the proper notices to charge the parties, the notary is the agent of the bank and not of the depositor or owner of the paper. This general liability may be varied by express contract or by implication arising from general usage; but the practice or usage of banks, adopted for their own convenience in the transaction of their business, cannot vary the contract between them and their dealers. (*Id.*)

10. A direction by a depositor to protest the note if not paid, does not, by legal implication, establish a special contract limiting the liability of the bank. The usual and popular meaning of the term

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"protest" is a demand of payment in proper form and at a proper time, and, in case of non-payment, due and reasonable notice to the indorser by the bank, or any of its clerks or servants, or other suitable persons. (*Id.*)

11. The delivery of a bill of lading to a bank for the purpose of securing the payment of drafts drawn by the consignor upon the consignee and discounted by the bank, is sufficient to transfer the title to the property covered by the bill of lading, subject to be diverted only by acceptance of the draft. (*Cayuga Co. Nat. Bank agt. Daniels*, 47 N. Y., 631).

12. If, before the maturity of paper held by a bank against a depositor, an arrangement is made by which the bank agrees to hold the deposit for a specific purpose, and not to charge the note against it, the bank may be regarded as a trustee and the deposit special. (*National Bank of Fiskill agt. Speight*, 47 N. Y., 668).

13. In such a case, in the absence of fraud or collusion, an indorser upon such paper has no right to require the application of the deposit toward the payment of the paper upon its maturity. (*Id.*)

See TITLE. (47 N. Y.) *

BANK PRESIDENT.

See JUDGMENTS. (4 *Lansing*.)

BANKING CORPORATIONS.

See JUDGMENTS. (4 *Lansing*.)
NATIONAL BANKS. (*Id.*)

BASTARDY PROCEEDINGS.

1. Where an overseer of the poor commenced bastardy proceedings before a justice of the peace, who was his son-in-law, and whose wife was still living, and this justice associated another with himself, and after the usual proceedings the justices made an order of filiation, and for the neglect of the party charged to comply with the same committed him to jail:

Held, that the overseer was a party to the proceedings in such sense that the proceedings were void and the justices liable to an action for false imprisonment. (*Rivenburgh agt. Honess*, 4 *Lansing*, 208).

BELLIGERENT.

See CONTRACT. (4 *Lansing*.)

BENEVOLENT SOCIETIES.

1. The consent and approbation of a justice of the supreme court required by the act of April 12, 1848, "for the incorporation of benevolent, charitable, &c., societies," to the certificate of organization of a society under that act, although necessary, like the acknowledgment before a commissioner, is not *conclusive* upon the secretary of state, nor upon the court, upon the question whether the association as its objects are stated in the certificate, is within the authority and meaning of the statute. (*The People, ex rel. Blossom agt. Nelson*, 60 *Barb.*, 159).

REQUEST.

See EQUITABLE CONVERSION. (4 *Lansing*.)

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A bank is not authorized to pay a note of its depositor, made payable at the bank, and charge him with the amount thereof where the depositor, before the maturity of the note, has notified the bank not to pay it. (*Egerton agt. Fulton National Bank*, ante, 216).
2. The relation of a bank with its depositors considered. (*Id.*)
3. Where payments are made upon a promissory note, given by the defendant to the intestate in his life time, to his widow having possession of the note, before letters of administration are granted to her, on the granting of such letters subsequently to her, the doctrine of relation, from the death of the intestate confirms her acts made for the benefit of the estate and renders the payments thus made a new promise and takes the note out of the statute of limitations. (*Townsend agt. Ingersoll*, ante, 276).
4. Where it is alleged as a defense by the acceptors of a draft, that it was not only without consideration in fact, but in addition was procured by means of a fraud practiced upon the acceptors, and was passed to the holder before acceptance, it is error for the court, on the trial to exclude the evidence offered to prove such facts—the court holding that the plaintiff having given the draft and its acceptance in evidence it was sufficient evidence of its ownership, being in his possession, and it was unnecessary for him to prove its consideration. Assuming that the proof offered by the defendants, would estab-

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lish the facts sought to be proved, it was not sufficient, as the case stood, to defeat a recovery on the draft:

Held, by the general term, on appeal, that where the acceptance is not only without consideration in fact, but procured by fraud practised upon the acceptors, the mere taking of the draft on account of an antecedent debt, without giving up or surrendering something of value on the faith of its acceptance, is not enough to constitute the holder a *bona fide* holder for value as against the acceptors. (*Philbrick* agt. *Dallett*, ante, 419.)

6. The drawee of a bill of exchange is presumed to know the handwriting of his correspondent; and if he accepts or pays a bill in the hands of a *bona fide* holder, to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money. A rule so well established, and so firmly rooted and grounded in the jurisprudence of the country, will not be overruled or disregarded. (*National Park Bank* agt. *Ninth National Bank*, 46 N. Y., 77.)

See PARTNERSHIP. (46 N. Y.)
USURY. (*Id.*)

5. In an action upon a promissory note, brought by the payee against the indorser, the complaint alleged that the note was executed and indorsed as a condition of a loan by the payee to the makers and as security for the payment thereof, and then set out the note, which by its terms was given "for value received."

Held, that the averments were sufficient to authorize evidence of the indorser's privity with the negotiation, and if he indorsed with a knowledge that his name was required by the payee as a condition of making the loan, and as security for its payment, he was placed in the same condition to the payee as though it had been done by agreement; that the value received, expressed in the note, was a sufficient averment of consideration, which by the other allegations, was shown to be the loan, and that these averments of making, execution and indorsement over were equivalent to an averment of delivery; and that although to negotiate the note, plaintiff must become the first indorser, yet the indorser being privy to the transaction and knowing the apparent relation was not the actual one, was liable. (*Meyer* agt. *Hibsher*, 47 N. Y., 265.)

6. Where a note is made payable at a

certain locality, without designation of a particular place therein, if the maker has no place of business or residence in the place where it is in general made payable, if the holder of the note is within such locality on the day of payment with the note ready to receive payment, that is sufficient to constitute a presentment and demand. (*Id.*)

7. It is competent for all the parties to a note to agree orally that the note shall be payable at a particular place, so far as to make a demand of payment there sufficient to bind the indorser. (*Id.*)
8. A promise by the indorser of a bill or a note to pay the same, made after full knowledge of an omission to make due presentment, is a waiver of such presentment, and binds the indorser.
9. A promissory note, payable on demand, whether with or without interest, is due forthwith, and an action thereon, against the maker, is barred by the statute of limitations, if not brought within six years after its date. (*Wheeler* agt. *Warner*, 47 N. Y., 519.)

See BANKS AND BANKING. (47 N. Y.)
CONTRACT. (*Id.*)
PARTIES. (*Id.*)
PARTNERSHIP. (*Id.*)
TITLE. (*Id.*)

BILL OF LADING.

See CONTRACT. (4 *Learning*.)

BILL OF PARTICULARS.

1. The office of a bill of particulars is to apprise defendants of the items which plaintiff expects to prove, and to restrict the proofs to the matters specified. (*Matthews* agt. *Hubbard*, 47 N. Y., 428.)
2. The merits of the case cannot be inquired into upon motion for a bill, nor can the sufficiency of the bill be determined by the allegations of the answer. (*Id.*)
3. The bill of particulars need not state more than plaintiff is bound to prove. If the specifications do not accord with the facts, or if they omit matters essential to the plaintiff's case, the defendant can take advantage of it upon the trial, not upon motion, to strike out the items objected to. (*Id.*)

BILL TO REDEEM.

See COMPLAINT. (60 *Barb.*)

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BOARD OF APPORTIONMENT.

1. Powers of the board of apportionment and audit are analogous in auditing claims, to those of the boards of supervisors in the several counties. (*People agt. Board of apportionment, ante, 412.*)
2. This board has a discretion as to the amount they shall allow on unliquidated claims. (*Id.*)
3. But it has no discretion when the amount is fixed by law or results from a valid specific contract. When a claimant's salary is fixed by law and he has done his whole duty, he has entitled himself to be paid. And it is not competent for this board to audit such a bill for any less than the whole amount. (*Id.*)
4. The board has a discretion as to how they shall audit a claim, yet it is a legal discretion and must be exercised faithfully and in accordance with legal principles. (*Id.*)

BOARD OF SUPERVISORS.

1. The provision of sec. 22 of the act of 1864 (chap. 8, Laws of 1864), authorizing the raising of money for paying bounties, etc., being silent as to the means to be used to procure enlistments, it devolved, by necessary inference, upon the board of supervisors to adopt such means and agencies to accomplish the purposes of the act as they should deem appropriate. A resolution of such board appointing a recruiting agent, authorized him to appoint sub-agents; his contract for their services bound the county, and he is not personally liable. (GROVER, J., dissenting as to power to bind county.) Even if the board had no authority to appoint the agent, yet, as its power was determined by the statute, known to both parties, the agent is not personally liable. The agent does not warrant the capacity of the principal to contract. (*Hall agt. Landerdale, 46 N. Y., 70.*)

See SUPERVISORS. (4 Lansing.)

BONA FIDE HOLDER.

See JUDGMENTS. (4 Lansing)
NOTES AND BILLS. (*Id.*)

BONA FIDE PURCHASER.

See VENDOR AND PURCHASER. (60 Barb.)

BOND.

1. Defendant M. purchased of plaintiff an individual bank, and he, with the other defendants as his sureties, executed to plaintiff a bond of indemnity from all claims of every kind against said bank. Prior to the transfer, certain depositors had received a promissory note to the amount of their claims against the bank, and the accounts had been balanced and closed upon the books of the bank. The note not being paid at maturity, the depositors offered to return it, and demanded payment of their respective accounts, claiming, among other things, that they had been induced to take the note by fraudulent representations of plaintiff. This state of affairs, plaintiff testified, was known to M. at the time of the transfer and giving the bond. Subsequently plaintiff was sued for the amount of the deposit balances due at the time of the receipt of the note. M., upon notice, employed counsel and defended the action; but the plaintiff in that action recovered judgment, which the plaintiff here paid. In a suit brought upon the bond:

Held, 1st. That whether the judgment in the action against plaintiff was recovered on the ground that the note was received by the depositors as conditional payment only, or that it was received as payment, but the agreement was rescinded on account of the fraud of plaintiff; in either view the case was brought within the letter and plain intention of the bond.

2d. That, if M. had knowledge of these outstanding claims, plaintiff was not concluded by the bank books; that the evidence given was sufficient to require the submission of the question of knowledge to a jury, and a non-suit was, therefore, error.

3d. That the rejection of testimony offered by plaintiff, tending to show that M. had such knowledge, was error. (*Hart agt. Messenger 46 N. Y., 253.*)

See APPEAL. (46 N. Y.)

RAILROAD MUNICIPAL BONDS. (4 Lansing.)

BONDING TOWNS.

1. A petition (under the laws of 1871) of the taxpayers of a town, presented to the county judge for the purpose of bonding the town, for railroad purposes, is palpably defective, where it omits to state that the railroad company is a

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corporation in his state. (*Matter of the Town of Gorham*, ante, 263).

2. Where the petition contains a condition as follows: "If the said The Geneva and Southwestern Railway Company accept the subscription to its stock and payment therefor by the bonds or proceeds as authorized by this petition, they thereby forfeit all right, and hereby agree to make no claim to any bonds of said town of Gorham, or the proceeds thereof by virtue of a certain other petition of the taxpayers of the said town, to issue the bonds of said town for a like amount and purpose, which petition was filed with the county judge of Ontario county, October 28, A.D. 1871":

Held, that it is not to be presumed that the petitioners would have given their consent to bond the town in this proceeding for \$50,000, if they had understood they were powerless to prevent the company from accepting the bonds, or the proceeds thereof for \$50,000 more, in case the company is successful in that proceeding which is now in process of review. Yet such is the fact; and if both proceedings are successful, the town may be bonded for \$100,000, in spite of the petitioners. This condition is also fatally defective to said petition. (*Id.*)

BOOKS OF ACCOUNT.

See EVIDENCE. (60 *Barb.*)

BOUNTY MONEY.

See PARENT AND CHILD. (4 *Lansing.*)
TOWNS. (*Id.*)

BOUNDARY LINE.

See CONTRACT. (46 *N. Y.*)
See ADVERSE POSSESSION. (4 *Lansing.*)
EVIDENCE. (*Id.*)

BOUNTIES.

See BOARD OF SUPERVISORS. (46 *N. Y.*)

BREACH OF PROMISE.

See ORDER OF COURT. (4 *Lansing.*)

BRIDGES.

1. The measure of liability of adjoining towns, liable, under chapter 225, laws of 1841, to make and maintain bridges, may not be permanently changed by judgment of the court or submission to

arbitration. (*Corey* agt. *Rice*, 4 *Lansing*, 141).

2. Accordingly, in an action against a commissioner of highways, by like commissioners of adjoining towns, to recover a proportion of the expense paid by them for building a bridge between their towns:

Held, that a submission by the commissioners of the several towns to arbitration, made before the expenses in suit were incurred, and the arbitrators' award thereon, which purported to fix permanently the measure of future liability of the towns in respect to construction, &c., of the bridge, are incompetent evidence. (*Id.*)

3. A written contract with the builder for the construction of a bridge, signed by commissioners of highways of several towns, without addition of their title of office, and running in the names of the towns, binds the towns. (*Id.*)

See HIGHWAYS AND STREETS. (4 *Lansing.*)

BROOKLYN (CITY OF.)

See STATUTES. (60 *Barb.*)

BURDEN OF PROOF.

See BAILMENT. (46 *N. Y.*)
COMMON CARRIER. (*Id.*)
TRIAL. (*Id.*)
VENDOR AND VENDER. (*Id.*)
See PENALTY. (4 *Lansing.*)

BURYING-GROUND.

See FORECLOSURE. (4 *Lansing.*)

C.

CALENDAR.

1. Where a defendant has regularly noticed a cause for trial, but through mistake has omitted to file a note of issue with the clerk to have it put upon the calendar, the court on motion has the discretion, under the Code, to allow such note of issue to be filed with the clerk and the cause placed upon the calendar. But such motion will not be allowed to be made later than the first day of the circuit. (*Olson* agt. *Myers*, ante, 95).

CALL OF MINISTER.

See CONTRACT. (4 *Lansing.*)

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CANAL BOAT.

See CONSTITUTIONAL LAW. (4 Lansing.)

CANAL CONTRACT.

See CONSTITUTIONAL LAW. (4 Lansing.)

CANCELLATION OF DOCKET.

See JUDGMENTS. (4 Lansing.)

CARRIERS.

See COMMON CARRIERS. (4 Lansing.)

CASE.

1. A case submitted under sec. 372 of the Code, should present only questions of law. (*Clark agt. Wise*, 46 N. Y., 612.)
2. Where all the facts upon which the controversy depends, and which are necessary to give grounds for a conclusion of law, are not stated, the court cannot pronounce the judgment desired. (*Id.*)
3. The case submitted presented the following facts: Defendant, an insolvent, assigned all his property, real and personal, to H., an indorser, upon his paper, receiving good notes for the full value of the property, less than amount of the indorsement, payable in six twelve, and eighteen months:

Held, that from these facts the law would not, of necessity, conclude an actual fraudulent intent. But the question whether the transfer was fraudulent or not, was one of fact remaining in dispute. Proceedings therefore dismissed. (*Id.*)

See FINDINGS OF FACT AND CONCLUSIONS OF LAW. (46 N. Y.)
RULES OF COURT. (*Id.*)

CASES REVISED, OVERRULED, QUESTIONED, CRITICISED OR EXPLAINED.

1. *Brewster agt. Power* (10 Paige, 562), explained; *Ocean Nat. Bk. of N. Y. agt. Olcott et al.* (46 N. Y., 12.)
2. *McCartney agt. Bostwick* (32 N. Y. 56), explained; *Ocean Nat. Bk. of N. Y. agt. Olcott et al.* (46 N. Y., 12.)
3. *Hibbard agt. N. Y. and E. R. B. Co.* (15 N. Y., 457), limited; *Higgins agt. The Watervliet T. and R. R. Co.* (46 N. Y., 23.)

4. *The People agt. Outton* (28 Cal., 44), disapproved; *The People ex rel. agt. Bull.* (46 N. Y., 57.)
5. *The People agt. Batchelder* (2 N. Y., 138), distinguished; *The People ex rel. agt. Bull.* (46 N. Y., 57.)
6. *In re Petition of George Douglass* (58 Barb., 174), reversed; *In re Petition of George Douglass.* (46 N. Y., 42.)
7. *The People ex rel. agt. Bull.* (41 How., 187), reversed; *The People ex rel. agt. Bull.* (46 N. Y., 57.)
8. *Nat. Park Bk. agt. Ninth Nat. Bk.* (7 App. Fr. N. S., 120), partially revised; *Nat. Park Bk. agt. Ninth Nat. Bk.* (46 N. Y., 77.)
9. *Nat. Park Bk. agt. Fourth Nat. Bk. of N. Y.* (7 App. Fr. N. S., 138), reversed; *Nat. Park agt. Fourth Nat. Bk. of N. Y.* (46 N. Y., 77.)
10. *Lawrence agt. Fox* (20 N. Y., 268), explained and limited; *Etna Nat. Bk. agt. Fourth Nat. Bk.* (46 N. Y., 82.)
11. *Binase agt. Wood* (37 N. Y., 526), distinguished and explained; *Grant agt. Smith.* (46 N. Y., 93.)
12. *People ex rel. agt. Hulburt* (59 Barb., 446), reversed; *People ex rel. agt. Hulburt.* (46 N. Y., 110.)
13. *M. A. Baptist Church agt. Baptist Church in O. St.* (5 Robt., 649), reversed; *A. M. Baptist Church agt. Baptist Church in O. St.* (46 N. Y., 131.)
14. *In re Protestant Episcopal School* (58 Barb., 161; S. C. 40 How. Pr., 139), reversed; *In re Protestant Episcopal School.* (46 N. Y., 178.)
15. *Taylor agt. Church* (4 Seld., 452), explained; *Sunderlin agt. Bradstreet et al.* (46 N. Y., 188.)
16. *Hart agt. Messenger et al* (2 Lansing, 446), reversed; *Hart agt. Messenger et al.* (46 N. Y., 253.)
17. *Bendison agt. French* (44 Barb., 31), reversed; *Bendison agt. French.* (46 N. Y., 266.)
18. *Lamb et al. agt. O. and A. E. R. and T. Co.* (1 Daley, 454), reversed; *Lamb et al. agt. O. and A. E. R. T. Co.* (46 N. Y., 271.)
19. *Kortright agt. Com. Bk. of B.* (20 Wend., 91, and 22 Wend., 348), explained; *McNiel agt. Tenth Nat. Bk.* (46 N. Y., 327.)
20. *Pryor agt. Carter* (1 Hurl. & Nor., 916), limited and explained; *Butterworth agt. Crawford.* (46 N. Y., 349.)

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21. *Acer* agt. *Westcott* (1 *Lansing*, 193), reversed; *Acer* agt. *Westcott*. (46 *N. Y.*, 384.)
22. *Whitebeck* agt. *Waine* (15 *N. Y.*, 532), explained and distinguished; *Davis* agt. *Lottick*. (46 *N. Y.*, 393.)
23. *East River Bk.* agt. *Kennedy* (4 *Keyes*, 679), commented on; *Wright* agt. *Hunter*. (46 *N. Y.*, 406.)
24. *White* agt. *Smith* (1 *Lansing*, 369), reversed; *White* agt. *Smith*. 46 *N. Y.*, 418.)
25. *Riley* agt. *City of Brooklyn* (56 *Barb.*, 559), reversed; *Riley* agt. *City of Brooklyn*. 46 *N. Y.*, 444.)
26. *Marbham* agt. *Jaudon* (46 *N. Y.*, 235), distinguished; *Stewart* agt. *Drake et al.* (46 *N. Y.*, 449.)
27. *The People* agt. *Stetson* (4 *Barb.*, 151), explained and distinguished; *McCord* agt. *The People*. (46 *N. Y.*, 470.)
28. *People ex rel. Blossom* agt. *Nelson* (10 *Abb. Pr. N. S.* 200; 3 *O.*, 3 *Lansing*, 394), reversed; *People ex rel. Blossom* agt. *Nelson*. (46 *N. Y.*, 457.)
29. *Witte* agt. *Green* (36 *N. Y.*, 556), questioned; *Austin* agt. *Dye*. (46 *N. Y.*, 500.)
30. *Smith* agt. *S. O. M. F. Ins. Co.* (3 *Hill*, 508), explained and distinguished; *Shearman* agt. *N. F. Ins. Co.* (46 *N. Y.*, 526.)
31. *E. and S. R. B. Co.* agt. *Davis* (43 *N. Y.*, 137), explained and distinguished; *In re N. Y. and H. R. B. Co.* agt. *Kip et al.* (46 *N. Y.*, 546.)
32. *Cope* agt. *Cordova* (1 *Rawie*, 203), explained and distinguished; *Radmond* agt. *N. Y. and P. S. Co.* (46 *N. Y.*, 578.)
33. *Chubbuck* agt. *Vernam* (42 *N. Y.*, 433), explained; *Stoddard* agt. *Whiting*. (46 *N. Y.*, 627.)
34. *Voss* agt. *Cockroft* (44 *N. Y.*, 415), distinguished; *Frochman et al.* agt. *Hamill et al.* (46 *N. Y.*, 636.)
35. *Palmer* agt. *Conly* (4 *Denio*, 374), explained; *Fisher* agt. *N. Y. C. and H. R. B. Co.* (46 *N. Y.*, 644.)
36. *Wibert* agt. *N. Y. and E. R. B. Co.* (19 *Barb.*, 36), limited. *Ward et al.* agt. *N. Y. C. R. B. Co.* (47 *N. Y.*, 33.)
37. *Batterman* agt. *Finn*, 40 *N. Y.*, 341), and *N. Y. and N. H. R. B. Co.* agt. *Matham* (3 *Keyes*, 24), distinguished. *Brinkley* agt. *Brinkley*. (47 *N. Y.*, 44, 46.)
38. *Winchell* agt. *Hicks* (18 *N. Y.*, 558), distinguished. *Low et al.* agt. *Hall et al.* (47 *N. Y.*, 105.)
39. *Fisk* agt. *Framingham Manufacturing Co.* (14 *Pick*, 491), distinguished. *Durss* agt. *Burton, et al.* (47 *N. Y.*, 172.)
40. *Burr* agt. *Beers* (24 *N. Y.*, 178), distinguished. *Garnsey* agt. *Rogers*. (24 *N. Y.*, 237.)
41. *Lawrence* agt. *Fox* (20 *N. Y.*, 268), distinguished. *Garnsey* agt. *Rogers*. (47 *N. Y.*, 237.)
42. *Van Bergen* agt. *Bradley* (34 *N. Y.*, 316), overruled. *Caughey* agt. *Smith*. (47 *N. Y.*, 248.)
43. *Langdon* agt. *Langdon* (4 *Gray*, 184), distinguished. *Eaton* agt. *Alger*. (47 *N. Y.*, 349.)
44. *Ryder* agt. *Hules* (24 *N. Y.*, 372), limited. *Barnes et al.* agt. *Underwood et al.* (47 *N. Y.*, 359.)
45. *Chouteau* agt. *Snydam* (21 *N. Y.*, 179), explained. *Austin et al.* agt. *Munro et al.* (47 *N. Y.*, 365.)
46. *Erickson* agt. *Quinn* (3 *Lansing*, 299), modified. *Erickson* agt. *Quinn*. (47 *N. Y.*, 410.)
47. *Crues* agt. *O'Donnell* (41 *N. Y.*, 661), explained and distinguished. *Cavalius et al.* agt. *Hellman*. (47 *N. Y.*, 454.)
48. *Dorwin* agt. *Potter* (5 *Denio*, 306), distinguished. *City of Brooklyn*, agt. *Brooklyn City R. R. Co.* (47 *N. Y.*, 482.)
49. *Terry et al.* agt. *Wiggins, et al.* (2 *Lansing*, 272), reversed. *Terry et al.* agt. *Wiggins et al.* (47 *N. Y.*, 512.)
50. *Merritt* agt. *Todd* (23 *N. Y.*, 28), distinguished. *Wheeler* agt. *Warner*. (47 *N. Y.*, 519.)
51. *Jeffreys* agt. *Boosey* (4 *H. L. O.*, 978), explained. *Palmer* agt. *De Witt*, (47 *N. Y.*, 540.)
52. *Gilbert* agt. *Gilbert* (1 *Keyes*, 159), questioned. *Foots* agt. *Bryant et al.* (47 *N. Y.*, 551.)
53. *Grey* agt. *Grey, et al.* (2 *Lansing*, 173), reversed. (47 *N. Y.*, 552.)
54. *In re Douglass* (46 *N. Y.*, 42), distinguished. *In re N. Y. P. E. Public School*. (47 *N. Y.*, 556.)
55. *Adams* agt. *Sage* (28 *N. Y.*, 103), distinguished. *Baker* agt. *Spencer*. (47 *N. Y.*, 564.)

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56. *Parsons, Adm'r. agt. Hughes* (9 Paige 501), distinguished. *Baker agt. Spencer*. (47 N. Y., 564.)
57. *O'Neill agt. James* (43 N. Y., 85), explained. *Stone et al. agt. Flower*. (47 N. Y., 568.)
58. *Pindar agt. Continental Ins. Co.* (38 N. Y., 386), distinguished *Reynolds agt. Commerce Fire Ins. Co.* (47 N. Y., 602, 606.)
59. *Dart agt. Ensign* (2 Lansing, 383), overruled. *Dart agt. Ensign*. (47 N. Y., 619.)
60. *Hammet agt. The City of Philadelphia* (8 Am. Law Reg., 411), questioned. *Gordon agt. Cornes*. (47 N. Y., 614.)
61. *Holbrook agt. Wright* (24 Wend., 169), distinguished. *Cayuga Co. Nat. Bank agt. Daniels*. (47 N. Y., 635.)
62. *Grossenor agt. Phillips* (2 Hill, 148), distinguished. *Cayuga Co. Nat. Bank agt. Daniels*. (47 N. Y., 636.)
63. The case of *Bunn agt. Vaughan*, (3 Keys, 345;) *Kane agt. Gott*, (24 Wend., 641,) and *Savage agt. Burnham*, (17 N. Y., 561,) commented on, and distinguished. (*Owens agt. Smith*, 9.)
64. The case of *Nichols agt. Nichols*, (23 N. Y., 264,) although it holds that as to the vendee, upon whom a fraud has been committed, the sale is voidable at his option, does not sustain the position that fraud in the sale renders the sale only voidable as to the vendor of whom the property was fraudulently purchased. (*Joelin agt. Covese*, 60 Barb., 48.)
65. The case of *Schaffner agt. Reuter*. (37 Barb., 44), commented on and distinguished. (*Briggs agt. Mitchell*, 60 Barb., 288.)
66. *Osgood agt. Laytin*, (5 Abb. N. S., 1), being a decision on the statute of this state, has no application to a creditor's suit brought to reach the assets of a foreign corporation. (*Bartlett agt. Drew*, 60 Barb., 648.)
67. *Chamberlain agt. Martin*, (43 Barb., 607), disapproved. (*Ballou agt. Cunningham*, 4 Lansing, 74.)
68. *Craig agt. Parks*, (40 N. Y., 181), distinguished. (*Field agt. Outler*, 4 Lansing, 195.)
69. *Howard agt. Hatch*, (20 Barb., 297), reaffirmed. (4 Lansing, 489.)
70. *Tuthill agt. Tracy*, (31 N. Y., 157), dictum in disapproved. 4 Lansing, 189.)

CAUSE OF ACTION.

1. In an action brought after a debtor's discharge in bankruptcy, to enforce a lien upon property held by the debtor's wife, claimed to have existed at the time of the discharge, under the provisions sections 51 and 52 of the statute of uses and trusts '1 R. S. Edmunds' ed., 677, §§ 31 and 52.)

Held, that those sections do not give a specific lien upon the property, but an equitable right to be enforced by suit in equity, after all available legal remedies are exhausted; that the commencement of the equitable action and filing of *lis pendens* is necessary to constitute a lien, and that as in this case, before the commencement of such action, the judgment or debt, which is the foundation thereof, was extinguished, the relation of debtor and creditor did not exist, and the action would not lie. (*The Ocean National Bank agt. Olcott*, 46 N. Y., 12.)

2. "The Florence Mills," having a balance of \$694.83 to its credit with defendant, sent to it, on the 2d April, by mail, a check on another New York bank for \$4,895, accompanied by a letter containing this direction: "which (the check inclosed) please credit our account, and charge us our note of \$5,000, due the 4th instant." The check was received and credited in account on the 3d, and, on the same day, defendant paid a past due note of \$5,000, of "The Florence Mills," payable at the defendant's bank, and charged it in account. On the 4th, the note referred to in the letter, held by plaintiff, was presented and payment refused:

Held, that the direction contained in the letter did not transfer the fund; that plaintiff acquired no title to it, and could not recover. (*The Atlas National Bank agt. The Fourth National Bank of New York*, 46 N. Y., 82.)

3. To maintain an action for the partition of lands, the plaintiff must, at the time of its commencement, have actual or constructive possession in common with defendants. A subsisting adverse possession is an absolute bar. (*Florence agt. Hopkins*, 46 N. Y., 182.)
4. When the bank account of a firm is kept in the name of one of its members, and all checks are drawn in his name, with the knowledge and assent of the others, the firm is liable upon a check thus drawn in its business. (*Crocker agt. Colwell*, 46 N. Y., 212.)
5. One M. held a judgment against plain

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tiff for over \$2,000. He proposed to plaintiff to discharge it for \$500. This offer was not accepted. R., a stranger to plaintiff, by falsely representing that he was a friend of, and came from plaintiff, induced M. to assign the judgment to him for \$500:

Held, that the only one injured by, or who could complain of the fraud, was M., that plaintiff was not entitled to the benefit of the purchase, and could not maintain action against R. (*Garsy agt. Jarvis*, 46 N. Y., 310.)

6. Defendant made his promissory note payable to plaintiff, which was indorsed by the latter and by T. Judgment was obtained thereon by the holder, who assigned it to N. for the benefit of T. Certain real estate of plaintiff's was sold upon the execution issued on said judgment. N. purchased and took a certificate of sale for the benefit of T., but in his own name. Defendant, ignorant of the sale, and deceived by T., paid the judgment in full to T., receiving a formal satisfaction of the judgment from N. Subsequently, plaintiff paid T. the amount of the bid on the sale, and received an assignment of the sheriff's certificate from N. After the discovery of the fraud practiced by T., plaintiff brought an action against him therefor, obtained judgment, and collected a portion thereof. He then brought this action to recover the residue of the money paid by him.

Held, 1st. The payment of the judgment to T., and satisfaction thereof, operated to cancel sale, and was, in fact, a redemption. Plaintiff was, therefore, under no legal obligation to redeem, and having paid the money to T. in ignorance of the facts, could recover it back; but had no claim against defendant; and, 2d. Even if this were not so, plaintiff had the election to affirm sale, claim it as payment of the judgment and sue defendant; or to claim the sale as canceled by the transaction between defendant and T., and sue the latter to recover back the money paid. But he could not pursue both, as they are inconsistent. Having elected to pursue the latter remedy, he is estopped from pursuing the former, although he failed to recover his whole judgment of T. (*Goss agt. Mather*, 46 N. Y., 660.)

See CONTRACT. (46 N. Y.)
ELECTION OF REMEDIES. (*Id.*)
FRAUD. (*Id.*)
INNKEEPERS. (*Id.*)
OFFICE AND OFFICERS. (*Id.*)
PARTITION. (*Id.*)
TENANT IN COMMON. (*Id.*)

STOCKHOLDERS. (*Id.*)

7. Plaintiff, a merchant in New York, received from N. & T. of Rochester, an order in writing for certain goods to be sent them "via canal." The goods were consigned to defendants, common carriers upon the canal, consigned to N. & T., pursuant to the order. The goods were lost en route.

Held, that upon the delivery to the carrier, the title passed absolutely to the consignees, subject only to the right of stoppage in transitu, and that plaintiff, the consignor, could not maintain an action for their loss. (*Kruidler agt. Ellison*, 47 N. Y., 36.)

8. By the term of an accident policy the sum insured was to be paid, if the insured "shall have sustained personal injury caused by any accident, and such injuries shall occasion death," etc.

Held, that if a wound received by deceased, being produced by an accident, did not cause death, but did cause him to fall into the water, where he was drowned, then the death was accidental and defendant liable. (*Mallory agt. The T. Ins. Co.*, 47 N. Y., 52.)

9. Where a contract is made for the sale and delivery of specified articles of personal property, under such circumstances that the title does not vest in the vendee, if the property is destroyed by an accident, without the fault of the vendor, so that delivery becomes impossible, the latter is not liable to the vendee in damages for the non-delivery. (*Dexter agt. Norton*, 47 N. Y., 62.)

10. A member of a voluntary unincorporated association for pleasure purposes cannot maintain an action in his own name upon a contract made with the association, nor has he an interest therein which he can so transfer that his assignee can maintain an action against the contractor with the association; nor can one member maintain an action at law, in behalf of the association, against another member upon any agreement made with the association. (*McMahon agt. Banker*, 47 N. Y., 67.)

11. A stipulation in a mortgage, whereby the mortgagee assumes and agrees to pay a prior mortgage on the premises, does not impose upon the mortgagee a personal liability for the prior mortgage debt, which can be enforced against him by the prior mortgagees. (*Garnsey agt. Rogers*, 47 N. Y., 233.)

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12. The same rule applies to a deed absolute, on its face, but, in fact, intended as a mortgage. (*Id.*)

13. C. delivered to plaintiff a negotiable promissory note, upon his undertaking to collect at his own expense, and upon its collection pay to C. \$300.

Held, that the plaintiff was the party in interest, within sec. 111 of the Code, and could maintain an action upon the note. *Eaton* agt. *Alger*, 47 N. Y., 345.)

See BANKRUPT LAW. (47 N. Y.)
EQUITY. (*Id.*)
RAILROAD CORPORATIONS. (*Id.*)
ACTION. (4 Lansing.)

CEMETERY ASSOCIATIONS.

1. A rural cemetery association, incorporated under chapter 133, Laws of 1847, is the legal owner in fee of the land, purchased for the purposes of the association. One to whom a cemetery lot is conveyed for burial purposes, takes under the statute, simply a right to use it for those purposes. No such estate is granted, as makes him an owner in such sense, as to exclude the general proprietorship of the association. In an assessment, therefore, for local improvements, it is proper to assess the whole premises to the association. (*R. B. Cemetery* agt. *City of B.*, 40 N. Y., 503.)

2. The provision of section 10, of the act providing for the incorporation of rural cemetery associations (chap. 133, Laws of 1847), which exempts the lands and property of such associations, from "all public taxes, rates and assessments," does not apply to a municipal assessment to defray the expenses of a local improvement. (*Id.*)

See STATUTE. (47 N. Y.)
See FORECLOSURE. (4 Lansing.)

CERTIFICATE.

1. A certificate of discharge issued under the bankrupt act of 1867, cannot be impeached in a State court on the ground that it was improperly granted. (*The Ocean Nat. Bk.* agt. *Alcott*, 46 N. Y., 12.)

CERTIORARI.

See TOWN BONDING. (47 N. Y.)
CRIMINAL LAW. (60 Barb.)
SUPERVISORS. (4 Lansing.)

CHATTEL MORTGAGE.

1. A mortgage of personal chattels is a sale on condition. Under it the legal title to the property is vested in the mortgagee, subject to the right of the mortgagor to perform the condition. (*Porter* agt. *Parmy*, ante, 445.)

2. Upon breach of the condition of a chattel mortgage, the legal title becomes absolute in the mortgagee, leaving a mere equity in the mortgagor. The mortgagee may thereupon take possession of the property, and so far as the legal rights of the parties are concerned, he may thenceforth treat it as his own. But if he pursues such a course he waives his claim for any deficiency that might otherwise arise. (*Id.*)

3. If the mortgagee, in addition to his legal rights, desires to extinguish the mortgagor's equity, after forfeiture, he must make a fair and *bona fide* sale under the power contained in the mortgage, or have recourse to actual foreclosure of the equity by judicial proceedings. (*Id.*)

4. All legal claim of the mortgagor being gone after forfeiture, he cannot sue for the property, nor sell it or give another valid mortgage or lien upon it. Nor, after forfeiture, is the mortgagee bound, at law, to receive the amount of the mortgage debt and restore the property to the mortgagor. (*Id.*)

5. While the mortgagor retains possession, before default, he may sell and deliver the property, and the purchaser takes all the interest the mortgagor had thereto, and holds it subject to the mortgage. Such purchaser may again, before default, sell and deliver to another with the like effect, and in such case the remedy of the mortgagee, upon maturity of the mortgage debt, is to follow the property and recover it from the possession of the last purchaser. (*Id.*)

6. If after default, the mortgagor is allowed to remain in possession, he may transfer such possession together with his equity of redemption. That is all the interest he has in the property, and all he can transfer, even to a *bona fide* purchaser for full value. But the mortgagee may, at any time, take the property out of the possession of such *bona fide* purchaser. (*Id.*)

7. Until default in the conditional payment, the mortgagor has such a possessory right for a definite period in the chattels mortgaged against the

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- mortgagee, coupled with the right of redemption, as is liable to levy and sale on execution. In such case the purchaser at the sale on the execution takes the property subject to the due mortgage, and acquires with it, a right to redeem it by payment of the amount on the mortgage. (*Id.*)
8. But after the mortgagee has acquired an absolute title to the property by reason of the mortgagor's default there is not left such a possessory right or interest in the mortgagor as is liable to be sold under an execution against him, and the rule is the same though the mortgagor is allowed to remain in possession after the default. In such case his possession is merely by the sufferance and as the bailee of the mortgagee. (*Id.*)
9. The mortgagee's rights as against creditors thus defined, may still become impaired and perhaps lost by a non-compliance with the statutory requirements against fraudulent conveyances and mortgages. (*Id.*)
10. The act of 1833 requiring chattel mortgages to be filed, does not repeal the statute as to fraudulent conveyances (2 *R. S.*, 136), but imposes on the mortgagee, who is willing that the mortgaged property should remain in the possession of the mortgagor, the duty of giving notice of the existence and continuance of his mortgage, by having the same filed and refiled, as provided for in the act. (*Id.*)
11. Whether a *refiling* of the mortgage, as to creditors of the mortgagor is wholly unnecessary after default—*Query!* (*Id.*)
12. But where, as in this case, an actual *change of possession* has taken place, after default, by the mortgagee delivering possession of the property to a partner of the mortgagor (without removal) with the consent of the latter, it cannot be deemed fraudulent against a creditor of the mortgagor, (who knew of the mortgage) whose demand did not become merged into a judgment until after such change of possession, although after the expiration of one year from the filing of the mortgage and no refiled had taken place. (*Id.*)
13. A sale of the property on such judgment and execution set aside, on the ground that the mortgagor had then no interest in the property subject to levy and sale, the title of the property was absolutely vested in the mortgagee. (*Id.*)
14. Where a mortgagee of personal property, after forfeiture, receives payment of his debt, it is a waiver of the forfeiture, and his title to the property is extinguished. (*West agt. Crory.* 47 *N. Y.*, 423.)
15. A mortgagor has an equity of redemption, even in case of forfeiture. (*Id.*)
16. Where a chattel mortgage contained a power to the mortgagor, in case of default in payment, to take possession of the property, and sell the same, and after deducting all expenses, to apply the proceeds in payment of the debt; and in case he should at any time deem himself unsafe, that he might take possession of the property and sell the same at *public* or *private* sale, before the day of payment:
- Held*, that on default in payment at the day, the mortgagee might sell the property at *private* sale, without notice to the mortgagor; and that if the sale was fair and *bona fide*, the right of the mortgagor to redeem was foreclosed. (*Ballou agt. Cunningham*, 60 *Barb.*, 425.)
17. To bar the mortgagor's right of redemption in mortgaged chattels, there must be a sale of the mortgaged property, of which he has notice. (*Ballou agt. Cunningham*, 4 *Lansing*, 74.)
18. A private sale without notice does not bar or foreclose the equity of redemption, notwithstanding the mortgage authorizes a private or public sale of the property. (*Id.*)
19. *Chamberlain agt. Martin*, (43 *Barb.*, 607,) disapproved. (*Id.*)

CHARITABLE INSTITUTIONS.

See CORPORATIONS. (46 *N. Y.*)
BENEVOLENT SOCIETIES. (30 *Barb.*)

CHECKS.

See PARTNERSHIPS. (46 *N. Y.*)
USURY. (*Id.*)

CHURCH.

See CONTRACT. (4 *Lansing*.)

CHURCH OFFICERS.

See RELIGIOUS CORPORATION. (4 *Lansing*.)

CITIES.

See NEW YORK CITY. (1 *Lansing*.)

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CLAIMS AGAINST EXECUTORS
AND ADMINISTRATORS.

See DONATIO CAUSA MORTIS. (4 *Lansing*.)
EXECUTORS AND ADMINISTRATORS.
(*Id.*)

CLASIS OF REFORM CHURCH.

See RELIGIOUS CORPORATIONS. (4 *Lansing*.)

CLIENT.

See ATTORNEY AND CLIENT. (4 *Lansing*.)

CLOUD UPON THE TITLE.

1. A party cannot maintain an action to remove a cloud from the title to land in which he has no interest, upon the sole ground that he is warranted the title. He can only be called upon, on his covenant of warranty, where there has been an eviction under valid and paramount title. (*Bissel agt. Kellogg*, 60 *Barb.*, 617)

CODE OF PROCEEDURE.

- § 11. *See* APPEAL. (47 *N. Y.*)
- § 17. *See* STATUTES. (*Id.*)
- § 54, sub. 4. *See* COSTS. (*Id.*)
- § 111. *See* PARTIES. (*Id.*)
- § 113. *See* INSURANCE, LIFE. (*Id.*)
- § 160, 166. *See* PRACTICE. (*Id.*)
- § 254. *See* APPEAL. (*Id.*)
- § 265. *See* APPEAL. (*Id.*)
- § 268, 272. *See* APPEAL. (*Id.*)
- § 271. *See* COSTS. (*Id.*)
- § 294, 297, 299, 302. *See* MOTIONS AND ORDERS. (*Id.*)
- § 317. *See* APPEAL. (*Id.*)
- § 352. JURISDICTION. (*Id.*)
- § 399. EVIDENCE. (*Id.*)

COLLECTORS.

See EXECUTORS AND ADMINISTRATORS.
(4 *Lansing*.)

COLLUSION.

See EVIDENCE. (4 *Lansing*.)
PRACTICE. (*Id.*)

COMMISSIONERS.

See STATUTE. (46 *N. Y.*)
OFFICE AND OFFICERS. (*Id.*)

COMMISSIONERS OF ESTIMATE
AND APPRAISEMENT IN NEW
YORK CITY.

See APPEAL. (4 *Lansing*.)
NEW YORK CITY. (*Id.*)

COMMISSIONERS FOR LOANING
U. S DEPOSIT FUNDS.

See LOAN COMMISSIONERS. (4 *Lansing*.)

COMMISSIONERS OF HIGHWAYS.

See BRIDGES. (4 *Lansing*.)
OVERSEERS OF HIGHWAYS. (*Id.*)

COMMON CARRIER.

1. Plaintiffs shipped at Cairo, Ill., by the Illinois Central Railroad, a quantity of cotton consigned to S. W. & Co., New York. In the bill of lading given by the I. C. R. R. Co., its agent was named as consignee at Chicago. The bill of lading exempted that company from "damage or loss by fire," and also, from all responsibility for the safety or safe carriage of the packages beyond the lines of its road, but stipulated that the through rate should be two dollars per 100 pounds. The I. C. R. R. Co. contracted for the transportation from Chicago to New York with the U. T. Co. The bill of lading containing a similar exemption from loss or damage by fire, and also a stipulation, that in case of loss the latter company should be liable only for the value of the property at the time of shipment. The cotton was received by defendants at Philadelphia; transported to New York, and while in their custody upon their pier, destroyed by fire:

Held, 1st. That the contract with the I. C. R. R. Co., was not a through contract; but under it, that company had power to contract for the transportation beyond the line of its road, and to provide in such contract, for a like exemption of the subsequent carrier, as that contained in its own contract with plaintiffs. It had no power, however, to bind the latter by any stipulation not embraced in that contract.

2d. That the exemption from damage or loss by fire, did not exonerate defendants from a loss so happening, in case the fire resulted from its own negligence.

3d. That plaintiffs, to maintain their action, must show affirmatively such negligence.

A ruling, therefore, of the court upon the trial, that the burden of proof was on the defendant, to show the fire was not caused by any negligence on its part, and a similar charge to the jury was erroneous. (*PECKHAM and ALLEN, JJ.*, dissenting. (*Lamb agt The C. and A. R. R. & T. Co.*, 46 *N. Y.*, 271.)

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2. In an action against a common carrier, for a failure to transport and deliver goods in accordance with his contract, the measure of damages is the value of the goods at the place of destination, at the time they should have been delivered pursuant to the contract, and in the condition the carrier undertook to deliver them, less the price to be paid for his service. (*Sturges* agt. *Bissell*, 46 N. Y., 462.)
 3. A common carrier by water is not discharged from all responsibility for the safety of the goods intrusted to him, by a discharge from the vessel at a proper place, reasonable hour, and upon due notice; the wharf or place of discharge, not having been selected by the owner or consignee for storing the goods. (*Redmond* agt. *L. N. Y. and P. S. Co.* 46 N. Y., 578.)
 4. As a general rule, if for any reason the consignee does not appear to claim the goods, or does not receive them, it is the duty of the carrier to provide a proper place of deposit; or, in case of imported goods, subject to duty, to see that they are in proper custody. (*Id.*)
 5. A consignee is entitled to reasonable time to remove the goods; and until such reasonable time has elapsed, they are at the risk of the carrier, who has no right to put them in store for the consignee. (*Id.*)
 6. In the absence of any special contract, the law implies an agreement upon the part of a common carrier to transport merchandise within a reasonable time. If he negligently omits so to do, and the market value of the merchandise falls, the measure of damages is the difference in its value at the time and place it ought to have been delivered, and at the time of its actual delivery. (*Ward* agt. *The N. Y. O. R. R. Co.*, 47 N. Y., 29.)
 7. The carrier of passengers, in conveyance and vehicles propelled by steam, is bound to use every precaution which human skill, care and foresight can provide, and to exercise similar care and foresight in adopting new improvements, to assure additional protection. (*Caldwell* agt. *N. J. S. Co.*, 47 N. Y., 232.)
 8. The fact that skilful manufacturers of the machinery used in such conveyances do not use means of safety which science has made known and demonstrated to be useful and effective, although proper to be considered, is not conclusive upon the question of negligence. (*Id.*)
 9. In an action against such carrier, the burden of establishing negligence is upon the plaintiff; but where his evidence raises a presumption of negligence, by showing the happening of an accident, which usually, and according to the ordinary course of things, would not happen, if proper care was exercised, the burden is cast upon the defendant to relieve himself from that presumption. (*Id.*)
 10. The fact that a carrier by steamboat has fully complied with the act of congress, as to the safeguards to be used for the protection of passengers, does not clear him from liability, or remove a presumption of negligence established by the evidence. His liability is not in any manner restricted or limited by that act, but a failure to comply with its provisions would, of itself, subject him to a charge of negligence. (*Id.*)
 11. Defendant contracted to transport a quantity of cattle for plaintiff from Goderich to Buffalo, under the following stipulations:—"1st. The owners undertake all risks of loss, injury, damage and other contingencies, in loading, unloading, conveyance and otherwise. 2d. The company do not undertake to forward the animals by any particular train, or at any specified hour; neither are they responsible for the delivery of the animals within any certain time or for any particular market." The cattle were transported to Brantford, and there the cars containing them were detached and placed upon a side track, where they could neither be unloaded, nor fed and watered, and were left for two or three days. In consequence some of the cattle died and others were injured. Held, that this was not an act of negligence in the execution of the contract, but an entire and intentional abandonment of all effort to perform the contract for the time, thus constituting a breach of the contract, and that defendant was liable. (*Kenny* agt. *The G. T. R. R. Co.*, 47 N. Y., 525.)
- See CONSIGNOR AND CONSIGNEE. (47 N. Y.)
 NEGLIGENCE. (*Id.*)
12. Where a carrier receives goods for transportation, addressed to a point on the line of a connecting carrier, and receives a price for the entire distance; it undertakes that the goods shall be carried through for the price paid; and this is so whether it is bound, merely for transportation by the connecting road without increasing charge, or for

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the risks of a common carrier to the place of destination. (*Condict agt. Grand Trunk Railway, 4 Lansing, 106.*)

See CONTRACT. (4 *Lansing*.)
RAILROAD COMPANY. (*Id.*)

COMMON LAW REMEDY.

See FEDERAL COURTS. (4 *Lansing*.)

COMMON SCHOOLS.

1. The expense of actions commenced or defended by the trustees of a school district without a previous resolution of the district, and for which expenses, notwithstanding the want of a previous resolution, an assessment may be made upon the district by a vote of the inhabitants at a district meeting, or on appeal from their refusal, to the county judge, under sections 9 and 10 of title 13 of the act of 1861, "to revise and consolidate the general acts relating to public instruction," do not embrace penalties which are expressly excluded from the operation of section 8. (*The People ex rel. Gilpatrick agt. Hatch, 60 Barb., 228.*)
2. It is only cases arising under section 8, which the county judge may review on appeal taken and heard as provided in section 9 and 10. (*Id.*)

COMPLAINT.

1. A creditor at large, with a judgment which is a general lien upon all his debtor's real estate, cannot maintain an action in equity to set aside the fraudulent conveyances of his judgment debtor, which obstructs the collection of his judgment out of such real estate, without the *issuing of an execution* and ascertaining that it cannot be collected of the personal property of his debtor. (*The authorities upon this question examined and considered.*) (*Payne agt. Sheldon, ante, 1.*)
1. Where an execution has been duly issued by a judgment creditor to the sheriff of county, and by him returned unsatisfied, a complaint by the judgment creditor, in equity, to reach the property of the judgment debtor is defective if it does not allege that the execution was issued to the sheriff of the county *where the judgment debtor resided* at the time of its issue and of the recovery of the judgment. (*Payne agt. Sheldon, ante, 1.*)
2. A motion to make more definite and

certain, under section 160 of the Code, should point out wherein the alleged defect consists. (*Rathbun agt. Markham, ante, 371.*)

3. Where a summons and complaint were issued against the city of Lockport to recover a liquidated specified sum, for services as police constable, an allegation in the complaint that the defendant neglected and failed to keep the means in the hands of its treasurer to pay said account, and that there was no funds in his hands out of which he could properly pay said order, did not make the cause of action in the complaint a *tort* for negligence. (*Prudden agt. City of Lockport, ante, 286.*)
4. Consequently, there was no variance between the summons and complaint; both were for a money demand on contract. (*Id.*)

See PLEADINGS. (46 *N. Y.*)

5. The addition of the words "the commissioners of the board of excise of—county" to the names of the plaintiffs in the title of a cause, without anything else, is in law a mere description of the persons, and indicates that the action is the private action of the plaintiffs. (*Bonsteel agt. Gartinhouse, 60 Barb., 338.*)

6. In a bill to redeem, an offer to pay whatever may be found due upon the mortgage, or a tender of the amount which the plaintiff concedes to be due, are indispensable. Without one or the other of these, the complaint does not set forth a cause of action. (*Silbes agt. Smith, 60 Barb., 372.*)

See PHYSICIANS AND SURGEONS. (60 *Barb.*)

FORECLOSURE. (4 *Lansing*.)

PLEADINGS. (*Id.*)

PRACTICE. (*Id.*)

COMPTROLLER'S DEED.

See TAX SALES. (47 *N. Y.*)

COMPROMISE.

See SUPERVISORS. (4 *Lansing*.)

CONCLUSION OF LAW.

See PRACTICE. (4 *Lansing*.)

CONDITIONS.

See ASSESSMENT AND TAXATION. (47 *N. Y.*)

CORPORATIONS. (*Id.*)

FORECLOSURE. (4 *Lansing*.)

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CONDITIONAL DEVISE.

See BRUNDAGE *agt.* DOMESTIC AND FOREIGN MISSIONARY SOCIETY. (60 Barb.)

CONDUCTOR.

See RAILROAD COMPANY. (4 Lansing.)

CONFLICT OF LAWS.

See WILLS. (46 N. Y.)
WILLS. (47 N. Y.)

CONGRESS.

See STAMPS. (47 N. Y.)
TRIAL. (*Id.*)

CONSIDERATION.

See GENERAL ISSUE. (60 Barb.)
ACTION. (4 Lansing.)

CONSIGNOR AND CONSIGNEE.

See COMMON CARRIER. (46 N. Y.)

1. Plaintiff, a merchant in New York, received from N. & T., of Rochester, an order in writing for certain goods to be sent them "via canal." The goods were delivered to defendants, common carriers upon the canal, consigned to N. & T., pursuant to the order. The goods were lost en route.

Held, that upon the delivery to the carrier, the title passed absolutely to the consignee, subject only to the right of stoppage *in transitu*, and that plaintiff, the consignor, could not maintain an action for their loss. (*Kruidler agt. Ellison*, 47 N. Y., 36.)

2. In the absence of a stipulation or condition in a contract of transportation, by which the intermediate consignee is to pay the freight, such consignee is not liable for the freight of goods sent and received by him in the course of transit to forward the same to the ultimate consignee, when the agency is known to the carrier at the time of the delivery of the goods, and he delivers the same without making any claim for back freight, or giving notice that any claim or lien existed on his part. (*Dart agt. Ensign*, 47 N. Y., 619.)
3. No promise by an intermediate consignee, who is not the owner of the goods, to pay the freight thereon, will be implied from a bill of lading con-

signing the goods to the care of such intermediate consignee for the owner at the place of ultimate destination. (*Id.*)

4. Where property is delivered to a carrier upon consignment to a factor for sale, the consignee only acquires title thereto in case the shipment is accompanied by an unconditioned consignment in pursuance of an agreement to ship, thus showing that the delivery to the carrier was with intent to give the consignee a right of property, free from any condition whatever. An agreement to ship, although founded upon a good consideration, gives no title. An owner of property, therefore, who has made a prior agreement to consign the same, may, notwithstanding, impose any conditions upon the consignment he chooses, and the consignee can only acquire title thereto by performing the conditions. (*Cayuga Co. Nat. Bank agt. Daniels*, 47 N. Y., 621.)

5. Where an express company has carried a box marked "C. O. D.," and the sum charged thereon has been paid by the consignee, and the package, on being opened, proves to be worthless, and a "swindle," on the part of the consignor; and the agent of the express company, on the discovery of the fraud, returns the money to the consignee, he cannot recover it back, even upon the promise of the consignee to "make it right." (*Herrick agt. Gallagher*, 60 Barb., 566.)

See COMMON CARRIER. (4 Lansing.)

CONSISTORY OF REFORMED CHURCH.

See RELIGIOUS CORPORATIONS. (4 Lansing.)

CONSTABLE.

See EVIDENCE. (4 Lansing.)
EXECUTION. (*Id.*)

CONSTITUTION.

1. The record of a decree obtained in another State, is not conclusive as to jurisdiction, but the facts therein stated giving the court jurisdiction may be disputed. This rule is not in conflict with sec. 1, article 4, of Constitution of the United States. (*Hoffman agt. Hoffman*, 46 N. Y., 30.)

See APPEAL. (46 N. Y.)

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2. Since the adoption of the Constitution of 1846, the organization of courts of Oyer and Terminer is within the control of the legislature, with the single exception that a justice of the Supreme Court must be a member of the court, and must preside. The legislature may associate other judicial officers with the presiding justice, or provide for commissioners to act with him, or allow him to preside without associates, making him the sole judge of the court. The word "preside," as used in section 6 of article 6 of the Constitution of 1846, and in section 7 of the same article, as amended in 1869, does not necessarily imply that he must have associates. (*P. W. Smith agt. The People*, 47 N. Y., 330.)

3. The established canons of construction applicable to statutes, to wit, that the intent of the lawmaker is to be sought for, and, when discovered, is to prevail over the literal meaning of the words of any part of the law; and that this intent is to be discovered, not alone by considering the words of any part, but by ascertaining the general purposes of the whole, and by considering the evil which existed calling for the new enactment, and the remedy which was sought to be applied; apply as well to the construction of a Constitution as to that of a statute law. A constitution is also to be held as prepared and adopted in reference to existing statutory laws, upon the provisions of which, in detail, it must depend to be set in practical operation. (*People ex rel. Jackson agt. Potter*, 47 N. Y., 375.)

4. By the judicial article of the Constitution (article 6), adopted in 1879, it was intended that the general mode of filling the higher grade of judicial offices (unless and until it should be otherwise determined by the people, as therein provided) should be by election, at a general election, and not by appointment. It was also intended to create and secure longer terms, and to avoid fractions of terms, and one full term was designed to follow after another, and that these terms should end with one, and begin with another and the next political year. The vacancies provided for do not include one resulting from the expiration of a full term. Such a vacancy is to be filled by the choice of the electors at the general election next preceding the expiration of the term. (*Id.*)

5. Where, therefore, a justice of the Supreme Court, in office at the time

of the adoption of said article 6, whose term of office expired December 31, 1871, resigned the day prior to the general election in November, 1871, at which general election a successor to the office was elected—

Held, that the vacancy occasioned by the resignation only existed from the time of the resignation to the end of the term in which it occurred, to wit, to and including December 31, 1871; that under section 9 of said article, the governor had the authority to fill such vacancy, but that the appointment could be for that space of time, and no longer; and that, at the expiration of that time, and on the beginning of the new full term, the justice elect became the constitutional and legal justice of the Supreme Court for that new full term. (*Id.*)

CONSTITUTIONAL LAW.

1. The act of congress of 1866, and amended in 1867, concerning the removal of causes from state courts, "at any time before the final hearing or trial of the suit," &c., is *unconstitutional*, and invalid as divesting the state courts of acquired jurisdiction in such cases, which by the judicial act of congress of 1789, is made concurrent with the U. S. courts. (*Stephens agt. Howe*, ante, 134.)

2. And there is no power conferred by the constitution of the U. S., upon the federal government, to divest a state court of its jurisdiction acquired in such cases. (*Id.*)

3. Where the constitution of the state directs that certain officers shall be elected by the people, and authorize the legislature to fix the term of office, and the time and manner of election; after the length of term has been prescribed by legislative enactment, and the office filled, an act extending the term of the incumbent is *unconstitutional*:

Held, therefore, that sec. 1, of chap. 217, Laws of 1866, extending the term of the incumbents, of the office of justice and clerk of the district court of the eighth judicial district, in the city of New York, is in conflict with sec. 18 of art. 6, of the constitution of 1846, and is void. (*The People ex rel. agt. Bull*, 46 N. Y., 57.)

4. The constitution of the state confers upon the legislature *all* legislative power; and if an act is within the legitimate exercise of that power, it is valid, unless some restriction or limita-

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tion can be found in that instrument itself. (*The People ex rel. agt. Flagg et al.*, 46 N. Y., 401.)

5. The making and improvements of public highways, and the imposition of taxes, are among the ordinary subjects of legislation. The Legislature, therefore, has power to direct the construction of a highway in any town, to compel the creation of a town debt by the issue of its bonds, and to impose a tax upon the property of the town to pay the bonds, without the consent of the citizens or town authorities. (*Id.*)

6. The provisions of chap. 459, Laws of 1862, as amended by chap. 814, Laws of 1867, authorizing the seizure of animals trespassing upon private premises, are constitutional. The act does not impose a penalty for the trespass, but simply prescribes and fixes the remedy therefor; and remedies are clearly within the peculiar province of legislation. The temporary seizure and detention of property as authorized by the statute, awaiting judicial action, is not violative of the provisions of art. 1, sec. 9, of the Constitution, directing that no person shall be deprived of property without due process of law. (*Cook agt. Gregg*, 46 N. Y., 439.)

See NEW YORK CITY. (46 N. Y.)

9. The lien of a judgment upon real estate is purely statutory, and it is within the power of the legislature to abolish this lien at any time before rights have become vested, or estates acquired under it, and to confine the remedies of the creditor to the property held by the judgment debtor at the time of the issuing of execution. A provision, therefore, causing the lien of a judgment which has not ripened into a title, to be superseded by the taking of the land under proceedings in the exercise of the right of eminent domain, on payment of compensation to the owner of the land is valid. (*Watson agt. The N. Y. C. R. R. Co.*, 47 N. Y., 157.)

10. The provisions of the act of 1822 (Laws of 1822, chap. 257, § 4), which enacted that no property of the Society of the New York Hospital should be subject to be taxed by virtue of any law of this State, did not constitute a contract, but was a spontaneous concession, and, therefore, subject to modification or repeal. (*People ex rel. agt. Com. of Taxes, etc.*, 47 N. Y., 501.)

11. The subject expressed in the title of the act entitled "An act to make provision for the government of the

county of New York." (chap. 875, Laws of 1866), embraces the raising and appropriating of money, the imposition of taxes to defray the expenses of the government of the county, and also a consideration of the property to be taxed. The provision, therefore, of section two of that act, which provides that the real estate of the New York Hospital, except buildings which are actually used for hospital purposes, shall be liable to taxation the same as other property, is not in contravention of section 16, article 3 of the Constitution, and is effectual to modify and restrict the exemption contained in the act of 1822. (*Id.*)

12. The power of apportionment is included in the power to impose taxes, and is vested in the legislature; and, in the absence of any constitutional restraint, the exercise by it of this power cannot be reviewed by the courts. (*Gordon agt. Cornes*, 47 N. Y., 608.)

13. Where a tax is imposed upon a particular locality to aid in a public purpose, which the legislature may reasonably regard as a benefit to that locality, as well as to the State at large, inequality in the apportionment of the expenses of the undertaking, with reference to the benefits resulting to the State and the locality, cannot be alleged for the purpose of impugning the validity of the act. (*Id.*)

14. The seventh section of the act in regard to normal schools (chap. 466, Laws of 1866), which appropriates a portion of the common school fund for the support of normal schools, is repugnant to section 1 of article 9 of the Constitution, and is void; but inasmuch as the legislature has the power to carry into effect the general design of the act, and to make appropriations for the support of those schools, an error in designating the fund out of which such support shall be drawn will not be held to defeat the whole act. By establishing these schools and inducing contributions from others, the legislature assumed the duty of supporting them; the particular provision which it has attempted to make for that purpose being objectionable, it must be assumed that the legislature will regard it as their duty to provide a substitute. (*Id.*)

15. The act entitled "An Act in Relation to the Establishment of a Normal Training School in the Village of

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Brockport," (chap. 96, Laws of 1867), is not in conflict with section 16 of article 3 of the Constitution; it embraces but one subject, which is fairly expressed in its title (*Id.*)

See STAMPS. (47 N. Y.)

14. The constitution of this state having provided that when private property shall be taken for any public use, the compensation therefor, when not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, (*Const. art. 1, § 7.*) the provision in the charter of the Rochester Water Works Company, (*Laws of 1852, ch. 356, §§ 8-11.*) which authorizes the *supreme court* to increase or reduce the amount of damages reported by commissioners, for the taking of land for the use of said company, is unconstitutional and void. (*The Rochester Water Works Company* agt. Wood, 60 Barb., 137.)

15. The act of the legislature, of May 9, 1867, (*chap. 814.*) amending the act of April 23, 1862, "to prevent animals from running at large in the public highways," provides for a judicial proceeding in which the justice has jurisdiction of the parties and of the subject matter, and therefore, so far as it authorizes the seizure of animals trespassing on a private inclosure, is not liable to the objection that it is penal in its character, and deprives the owner of his property without due process of law; but is valid and constitutional. (*Squares* agt. Campbell, 60 Barb., 391.)

16. The act is not unconstitutional because it interferes with the right of trial by jury. Due process of law does not necessarily import a trial by jury. (*Id.*)

See JUDGMENT. (60 Barb.)

17. The constitution provides (art. 7, § 3), requiring contracts for work and materials on any canal to be made with the lowest bidder, will not permit the canal board, after a contract has been awarded, to increase the price of work and materials to be subsequently done or provided under such contract, even if authorized so to do by an act of the legislature. (*People* agt. Canal Board, 4 Lansing, 272.)

See HIGHWAYS AND STREETS. (4 Lansing.)**CONSTRUCTIVE NOTICE.**

1. A recital in a deed, forming a link in

the chain of title of any facts, which should put a subsequent grantee or mortgagee upon inquiry, and cause him to examine other matters, by which a defect in the title would be disclosed, is constructive notice of such defect. But the basis of this rule is negligence, and it is only applicable to cases where the purchaser or incumbrancer is chargeable with gross negligence in not making the examination. (*Acer* agt. Westcott, 48 N. Y., 384.)

2. The record of an assignment of a mortgage is constructive notice as against a grantee of a mortgage, that the mortgagee can no longer deal with the mortgaged interests; and a subsequent discharge or release of the lien of the mortgage executed by him is invalid. (*Belden* agt. Meeker, 47 N. Y., 307.)

CONSTRUCTION OF CERTAIN STATUTES.**See ALIENS.** (4 Lansing.)

ARREST. (*Id.*)

BAIL. (*Id.*)

BASTARDY PROCEEDINGS. (*Id.*)

CONSTITUTIONAL LAW. (*Id.*)

EJECTMENT. (*Id.*)

EXECUTION. (*Id.*)

FEDERAL COURTS. (*Id.*)

FORECLOSURE. (*Id.*)

HIGHWAYS AND STREETS. (*Id.*)

HUSBAND AND WIFE. (*Id.*)

JUDGMENTS. (*Id.*)

JUROR. (*Id.*)

JUSTICE OF THE PEACE. (*Id.*)

LANDLORD AND TENANT. (*Id.*)

LOAN COMMISSIONERS. (*Id.*)

NE EXEAT. (*Id.*)

NEW YORK CITY. (*Id.*)

PARTNERSHIP. *Id.*

PENALTY. *Id.*

RAILROAD COMPANY. (*Id.*)

RAILROAD MUNICIPAL BONDS. (*Id.*)

SUBMISSION OF CONTROVERSY. (*Id.*)

CONTEMPT.

1. Where a regular judgment is entered giving the plaintiff possession of real property, and execution is issued putting him in actual possession, on setting aside the judgment and execution, the proper remedy of the defendant to compel restoration of the property, is to apply, under the Code, to the special term of the court for an order to show cause why possession should not be restored to him and an order granted on the hearing of the order to show cause, is sufficient authority to restore possession to the defendant. If disobedience to such an

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order is made it may be punished as for a contempt. (*Dawley* agt. *Brown*, ante, 17).

2. An order adjudging defendant in contempt and prescribing a punishment, is an order made in a special proceeding, and affects a substantial right, and, if final, is appealable to this court. (*Brinkley* agt. *Brinkley*, 47 N. Y., 40.)
3. If, however, the order is conditional and the punishment is not inflicted absolutely, but it is in the power of the defendant to avert it, it is not a final order, and is not appealable. (*Id.*)
4. The Supreme Court is not limited to punishment by fine and imprisonment, in enforcing obedience to its orders; but it has control over its own proceedings, and can refuse the benefit of them to the party in contempt when asked as a favor, and can prevent him from taking any aggressive proceedings against his adversary; but it has no power to stay him in his proceedings by motion or appeal, where the object is to rid himself of the alleged contempt, or to show that the order which he did not obey was erroneous. (*Id.*)

See MOTIONS AND ORDERS. (47 N. Y.)
See EXECUTION. (4 Lansing.)

CONTINGENT REMAINDER.

See WILLS. (46 N. Y.)

CONTINUANCE.

1. Upon the death of a sole defendant in an action, in which such defendant has interposed a counterclaim, and issue has been joined thereon, the representatives of such deceased defendant have a right to continue the action, if the cause of action is one which by law survives to them. (*Livermore* agt. *Bainbridge*, ante, 272.)
2. The action in such a case is not abated (*Code*, § 121), and the court will, upon motion, allow it to be continued by the executors. (*Id.*)
3. Where a defendant interposes a counterclaim in an action, and asks for affirmative relief, and issue is joined upon his claim, he becomes an actor in the case, and may proceed in it as if he were in fact a plaintiff (*Affirming S. C.*, at *Special Term*, 42 How., 53). (*Id.*)

CONTINUING SUIT.

See PRACTICE. (60 Barb.)

CONTRACT.

1. Where the owner of freight; which is to be carried by several railroad companies before it reaches its final destination, enters into a special contract with the railroad company from where it starts, to carry the freight, for a specified price to a certain station, which is the termination of the route of said railroad, and there to be delivered to another railroad as a connecting line, the owner, in consideration of the reduced price on the freight, agreeing to assume the risk of fire and other contingencies, which risk, and the other stipulations, are made applicable, by the general printed form of the contract, to all the other companies, is not a *through contract*, which enables the companies after the first, to avail them selves of the owner's special agreement with the first. (*Babcock* agt. *The Lake Shore & Mich. Southern R.R. Co.*, ante, 317).
2. The latter companies take the freight under the liability of common carriers, and if the freight is destroyed by fire while in the possession of one of them it is liable as a common carrier. (*Id.*)
3. It must however appear to be clear by the special contract of the owner with the first railroad, that it was intended to cover only the route of that road. And in construing such a contract, the printed form must give way to the written word where it is inconsistent with the latter. (*Id.*)
4. Where a contract, including a settlement of all accounts, is reduced to writing and signed by the parties, it merges all previous contracts, understandings, or expectations upon the subject. (*Lee* agt. *Decker*, ante, 479).
5. And where the testimony of one of the parties to such contract is in accordance with the writing, it will prevail over the contradicting testimony of the other party. (*Id.*)
6. One party to a contract is not estopped from enforcing it, by the execution of an instrument purporting to cancel the contract for a consideration where none in fact is received by him, and the act is induced by the false representations of the agent of the other party, although the latter has acted upon the faith of the declarations contained in said instrument, in settling the accounts of the agent. (*Holden* agt. *Putnam Fire Ins. Co.*, 46 N. Y., 1.)
7. Plaintiff sold and conveyed certain real estate to defendant; a part pay.

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ment was agreed to be made in cash, when a certain contemplated corporation should be formed:

Held, that the organization of the corporation was not the event which fixed the fact of the indebtedness, but it only marked the time when the payment of such indebtedness might be exacted, and that such corporation was formed in the contemplation of the contract, when such acts were done among the associates as would form and set on foot, in practical existence, a body in which they would have rights, and to which they would owe obligations, although no statutory organization had been perfected. (*Childs agt. Smith*, 46 N. Y., 34.)

8. The duties and liabilities of the parties to a contract, are measured by the terms of the contract to which they have formally assented, and not by anything that preceded. (*Riley agt. The City of Brooklyn*, 46 N. Y., 416.)

9. In order to constitute an agreement, there must be a proposition by the one party, accepted by the other; and when the parties are not together, the acceptance must be manifested by some appropriate act, and the manifestation put in the proper way of reaching the proposer; a mere mental determination to accept, not indicated by speech, or put in course of indication by act, is not an acceptance. Nor does an act, which in itself, is no indication of acceptance, become such because accompanied by an unvinced mental determination. Plaintiff, a builder in New York, received from defendants the following note: "Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can commence at once." No reply was sent, but plaintiff immediately purchased lumber for the work and began to prepare it. The next day the note was countermanded:

Held, that the purchase of, and work upon the lumber were not acts indicative to the defendants of acceptance, as they were as appropriate for any other like work, and made no binding contract between the parties. (*White agt. Cortles*, 46 N. Y., 467.)

10. Where a policy of insurance upon the life of one is made payable to and held by another, but is so held in whole or in part for the benefit of the insured, or of whomsoever he shall designate, the insured has the power to revoke *pro tanto* the authority of the holder, or to change the conditions of the holding, and to annex to it new conditions. And if the insured suffers it to remain

in the possession of the holder, upon his promising to pay a debt of the insured out of the avails of the policy when collected, this is a valid consideration for the promise; and the creditor for whose benefit it was made, although having no knowledge of it at the time, can affirm and enforce it. (*Hutchings agt. Miner*, 46 N. Y., 456.)

11. A dispute having arisen between plaintiff, defendant, and others, in regard to the location of the boundary lines of a lot of land owned by defendant, an agreement in writing to compromise and settle the same was entered into by all the parties, one provision of which was that M. should go upon the land and designate the line between plaintiff and defendant, as the same existed when M.'s father occupied the lot. Defendant offered proof of revocation upon his part of M.'s authority to locate the line, and also proof of actual location of the line, both of which were rejected.

Held, that the agreement was a valid and binding one, and fixed as the true line between the parties, the one that existed and was recognized when M.'s father occupied the premises, and left only the question to be determined as to the location of that line. But that M. was simply empowered to act as arbitrator upon this question, and as such his power was revocable. That the question should have been submitted to the jury to determine the location of the line, and that the rejection of the testimony, both as to revocation and location, was error. (*Wood agt. La Fayette*, 46 N. Y., 484.)

12. A contract valid in its inception, becoming void by virtue of its provisions, may be revived by the act of the parties thereto. A condition of forfeiture in a policy of insurance may be waived, and the policy revived after the happening of the event, which works the forfeiture, by any act from which the consent of the underwriters may be inferred. (*Sherman agt. The N. Fire Ins. Co.*, 46 N. Y., 526.)

13. In order to rescind a contract, on the ground of fraud, there must not only be a disaffirmance of it at the earliest practicable moment after the discovery, but a return of all that has been received under it, and a restoration of the other party, to the condition in which he stood, before the contract was made. The taking of any benefit under the contract after knowledge of fraud, or changing the condition of the property, the subject-matter of the contract, is a ratification of it. (*Cobb agt. Hatfield*, 46 N. Y., 533.)

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14. Defendant owned a dock upon the Hudson river, which, prior to May 1, 1867, had been used for freighting purposes, but was then not in use, which disuse detracted from its value. He entered into a parole agreement with plaintiffs by which he undertook, that in case they would carry on the freighting business from said dock, and run a boat therefrom to the city of New York to the close of the season of navigation, he would guarantee them from all losses or damages incurred. Plaintiffs, in pursuance of the agreement, chartered a steamboat, and conducted the business, as required, to the close of the season, and in so doing sustained a loss:

Held, that the risks and liabilities incurred by plaintiffs were a sufficient consideration for the promise of defendant, as was also the benefit secured to defendant's property; also, that the agreement was not void for want of mutuality. (*Sands* agt. *Cooke*, 46 N. Y., 564.)

15. A. S. entered into a written contract with the owner for the purchase of a parcel of land, and under it went into possession. Not being able to pay the purchase money at the time fixed by the contract, he made a parole agreement with the defendant, by which the latter agreed to and did pay a portion of the purchase price, took the title and gave his bond, secured by a mortgage upon the land, out of the avails of which the balance was paid. It was agreed that the defendant was to hold the title as security for the money advanced, the liability incurred, and certain other claims against A. S. A. S. continued in possession for two years. Defendant then entered into possession, no portion of the money advanced or secured having been paid him. By an instrument in writing, not under seal, A. S. assigns to plaintiff all his right, title, and interest, legal or equitable, in the premises:

Held, 1st. That by the contract with the vendor, A. S. became invested with the equitable title to the land, which interest was capable of being mortgaged; and that under the agreement with defendant the latter took and held the title as mortgagee, subject to the right of A. S. to redeem.

2d. That the terms of the assignment by A. S. to plaintiff, were sufficient to embrace and transfer the equity of redemption, and as an incident thereto, the right to an account of the rents and profits; and that as it was not a grant, in fee, or of a freehold interest, a seal was not requisite to its validity, nor

was it invalidated by the fact of defendant being in possession, and denying the right of redemption. (*Stoddard* agt. *Whiting*, 46 N. Y., 627.)

See COMMON CARRIERS. (46 N. Y.)
TENANTS IN COMMON. (*Id.*)
VENDOR AND VENDEE. (*Id.*)

16. Two contemporaneous writings between the same parties, upon the same subject matter, may be read and construed as one paper. If one of the writings is negotiable paper the same rule applies, in an action between the parties to it or their representatives. (*Rogers* agt. *Smith*, 47 N. Y., 324.)

17. Where, by the terms of a contract with a municipal corporation providing for the keeping of certain of its streets in repair, the object, the manner, the extent, and the material of the repairs are prescribed in clear and precise terms, a clause therein that the repairs shall be under the direction of such competent authority as the officers of the corporation may designate, is not a condition precedent to be observed by the corporation; and it is not bound first to designate such authority before it can hold the contractor to his agreement to repair. Such a clause is simply a reservation of a right of supervision of the work as it progresses, and does not prevent its performance. No more can be required of the contractor than is specified in the contract; and, when that is fully done, the contract is satisfied; as that which the law shall say a contracting party ought, in reason, to be satisfied with, that the law will say he is satisfied with. (*City of Brooklyn* agt. *B. C. R. Co.*, 47 N. Y., 475.)

18. Where one contracts with a municipal corporation to keep any portion of its streets in repair, in consideration of a license to use them to his benefit in an especial manner, he, in effect, contracts to perform that duty to the public, in the place and stead of the municipality, which, by the acceptance of its charter, was imposed upon it, i. e., to keep its ways in repair, so that they may be safe for the passage of the public; and the contractor is liable for any damages which naturally and proximately fall upon the corporation in consequence of the duty not being performed. Where, therefore, in consequence of a defect in a street embraced in such a contract, injury results to one of the public, who recovers of the corporation his lawful damages, the latter can re-

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cover them over of the contractor. As between the parties to the contract, the corporation is not in *part delictu*. (*Id.*)

See COMMON CARRIER. (47 N. Y.)
CONSTITUTIONAL LAW. (*Id.*)
CONSIGNOR AND CONSIGNEE. (*Id.*)
INSURANCE ACCIDENT. (*Id.*)
INSURANCE FIRE. (*Id.*)
VENDOR AND VENDEE. (*Id.*)

19. Under a contract for manufacture of a steam boiler according to specifications, and delivery at a specified time upon the vendee's boat, the vendee received the boiler at the time and place; it conformed to the contract apparently, and he built it into his boat for immediate use, in such manner that a removal would cause great injury to the boat; soon after, upon application of tests, it was found to vary materially from the specifications; the vendee did not offer to return, or notify the vendor to take it back. In an action by the vendor upon the vendee's note, given in part payment of the contract price:

Held, that the evidence to show the inferiority and unsuitableness of the boiler, by reason of the lack of conformity to the specifications, was inadmissible in defense. (*Neafie* agt. *Hart*, 4 *Lansing*, 4.)

20. F. T. L. resided in that part of Tennessee which became subject to the provisions of the president's proclamation of August 16, 1861, which prohibited "all commercial intercourse between" the states specified "and the inhabitants thereof, with citizens of other states," and remained there up to and after the time of the proclamation. J. W. L., his partner, resided at the same place, but fled, on the breaking out of the war, into the Union lines, and adhered to the Union cause, though compelled to make provision, for his family near his place of residence:

Held, in the absence of proof F. T. L.'s loyalty or disloyalty to the Union, that he was within the prohibitions of the proclamation, and thereby, and as a citizen of a belligerent state, precluded from making a commercial contract with a citizen of a loyal state; but that it was otherwise as to J. W. L.:

Held, further, that the partnership was terminated, *ipso facto*, by the war. (*Leitch* agt. *Clinton* 4 *Lansing*, 476.)

21. The relationship of pastor and people in the church known as "The Reformed Church in America," is purely ecclesiastical tribunals alone have cog-

nizance of it. (*Connit* agt. *Reformed Protestant Dutch Church of New Prospect*, 4 *Lansing*, 339.)

22. A contract between such a church and its minister, for the services of the latter, at a stipulated salary, based upon the fact of its subordination to the rules of church government, as established by the denomination, is subject to the ecclesiastical rule of the church; and a decree of the authorized church tribunal, dissolving the pastoral relation between the minister and his church, severs that relation, and annuls the contract of employment. (*Id.*)

23. Where the owner of cattle contracted for their transportation with the owner of a scow, upon which they were loaded, and the latter, without privity of the former, employed a steam-tug to tow the scow to its destination:

Held, that the shipper could not hold the owner of the tug liable for loss of the cattle happening through negligence of those in charge of the tug. (*Baird* agt. *Daly*, 4 *Lansing*, 426.)

24. Plaintiffs stated to the freight agent of defendants at N., that he desired to send goods from N. to M., neither of these points being upon defendant's route, and inquired at what rate defendants would carry the same. The agent stated the rate of charges, and instructed the plaintiffs as to the marking of the goods, and directed him to deliver them to the C. & A. Co., a company having a connecting line with defendants. The goods were afterward delivered by plaintiffs' direction to the C. & A. Co., marked as directed by the agent, and properly addressed to plaintiffs at M. and a bill of lading taken, headed with the name of defendants' road, and stipulating for the delivery of the goods to the defendants' agent at H., the terminus of the company's road, to whom they were delivered; also providing that the company in whose actual possession the goods might be at the happening of any loss, should alone be responsible therefor. The goods were safely delivered at the terminus of defendants' road, for delivery at M. to a common carrier, by whom they were lost:

Held, that what occurred between the plaintiffs and defendants' agent at N. did not amount to an agreement for the transportation of the goods; nor could the sending of the goods by the plaintiffs afterward, as directed by the agent, be considered as amounting to an acceptance by them of an offer made

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by the agent to carry the goods upon the prescribed terms. The bill of lading contained the only contract between the parties, and as it expressly stipulated for exemption from liability of the defendants for damage, except that happening while the goods were in possession of defendants, plaintiffs could not recover. (*Bicketts* agt. *Baltimore and Ohio R. E. Co.*, 4 *Lansing*, 446.)

26. A written contract for the purchase of certain specified hides, with a memorandum as follows: "No allowance except for sea damaged, price twelve cents per pound cash:

Held, a contract for purchase of all the hides subsequent to deduction for those which are sea damaged, and that the title under it passed upon delivery to the purchaser. (*Bacon* agt. *Gilman*, 4 *Lansing*, 456.)

See ACTION. (4 *Lansing*.)
 ASSIGNMENT. (*Id.*)
 BRIDGES. (*Id.*)
 COMMON CARRIER. (*Id.*)
 CONSTITUTIONAL LAW. (*Id.*)
 EVIDENCE. (*Id.*)
 FORECLOSURE. (*Id.*)
 INSURANCE. (*Id.*)
 LEASE. (*Id.*)
 MARRIED WOMAN. (*Id.*)
 MISTAKE OF LAW AND FACT. (*Id.*)
 MORTGAGE OF REAL ESTATE. (*Id.*)
 PARENT AND CHILD. (*Id.*)
 PARTIES TO ACTION. (*Id.*)
 PRACTICE. (*Id.*)
 RAILROAD CO. (*Id.*)
 SALE OF CHATTELS. (*Id.*)
 SEPARATE ESTATE OF MARRIED WOMEN. (*Id.*)
 TOWNS. (*Id.*)

CONTRACTORS.

See CONSTITUTIONAL LAW. (4 *Lansing*.)
 RAILROAD COMPANY. (*Id.*)

CONTRIBUTION.

See BRIDGES. (4 *Lansing*.)

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE. (47 *N. Y.*)

CONVERSIONS.

1. A bailee for hire, who uses the property contrary to the instructions of the bailor, is liable for a conversion thereof. Where property in the exclusive possession of such bailee, is injured in a way that ordinarily does not occur

without negligence, the burden of proof is upon the bailee, to show that the injury was not occasioned by his negligence. (*Collins* agt. *Bennett*, 46 *N. Y.*, 490.)

See ELECTION OF REMEDIES. (46 *N. Y.*)

STOCK BROKERS. (*Id.*)

CONVEYANCE.

See EVIDENCE. (47 *N. Y.*)
 DEED. (4 *Lansing*.)

CONVICTION.

See INDICTMENT. (4 *Lansing*.)

CORPORATE PROPERTY.

See CORPORATIONS. (4 *Lansing*.)

CORPORATIONS.

1. Under the act to provide for the incorporation of religious societies (chap. 60, laws of 1813, 3 *Edmonds*, stat. 687), the trustees of such a corporation are authorized to act in its behalf, in taking the steps required by sec. 11, for the purpose of effecting a sale of its real estate, and their acts are binding upon it, although it does not appear they had the express sanction or authority of a majority of the corporation. (*M. A. Baptist Church* agt. *Baptist Church in O. St.*, 46 *N. Y.*, 131.)
2. A corporation cannot be formed under the act for the incorporation of benevolent, charitable, scientific and missionary societies (chap. 319, laws of 1848), except for some or one of the purposes therein named. The right to file a certificate in the office of the secretary of state, by which a body politic and corporate is to be *ipso facto* created, only exists in behalf of those who bring themselves within the terms of the act. (*The People ex rel.* agt. *Nelson*, 46 *N. Y.*, 477.)
3. A corporation for business purposes, having in view pecuniary gain and profit to the corporators, does not come under this act, although it may contemplate the promotion of the temporal interests of others. (*Id.*)
4. The consent and approbation of a justice of the supreme court required by the act, is but one of the conditions precedent to the right to file the certificate, and is neither conclusive upon the public nor upon the secretary of state, who is not required to file a certificate unauthorized by the act. (*Id.*)

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5. The provisions of sec. 2 of the act of 1853 (chap. 343 of the laws of 1853), amending the act of 1848 (chap. 40 of the laws of 1848) authorizing the formation of corporations for manufacturing and other purposes, does not authorize the issue of stock, in addition to the capital stock stated in the certificate of organization, and any increase thereof made pursuant to the act of 1848. It simply authorizes the payment for such stock, in property necessary for the business of the company instead of in cash; and under its provisions the whole capital stock can be paid for in property, and when so paid for, the owner thereof is not liable to the creditors of the company under sec. 10 of the act of 1848. (*Schenck agt. Andrews*, 46 N. Y., 589.)

See BANKS AND BANKERS. (46 N. Y.)
CEMETERY ASSOCIATIONS. (*Id.*)
CONTRACTS. (*Id.*)
DEVISE. (*Id.*)
NEW YORK CITY. (*Id.*)
OFFICE AND OFFICER. (*Id.*)
RAILROAD CORPORATIONS. (*Id.*)
TOWN BONDING. (*Id.*)

6. To form a sufficient foundation for a judgment of ouster against a corporation for the forfeiture of a franchise not originally usurped, but legally vested, because of the breach of a condition subsequent, the verdict must show the fact, not merely of the breach of the letter of the subsequent condition, but of its intent and meaning, and must find such facts as the court may adjudge to amount to a substantial breach of the condition. (*People agt. W. Turnpike and B. Co.*, 47 N. Y., 586.)

7. Where, after the lapse of over fifty years from the incorporation of a turnpike company and the construction of its road, an action was brought to vacate its charter on the ground of misuser in omitting to comply with the provisions of the general turnpike law in the original construction of the road, and also in failing to keep the road in repair.

Held, that the fact must be established not only of a deviation from the statute, in the construction of the road, but that the road was thereby rendered injurious or inconvenient to the public; that the company was not bound to continue the road in the same condition required in its original construction, but only in a good state of general repair; and that, to warrant a forfeiture for an omission to keep in repair, it must be alleged and found that the want of repair was such as to

render the road dangerous or inconvenient to travelers. (*Id.*)

See BANKS AND BANKING. (47 N. Y.)
DAMAGES. (*Id.*)
MANUFACTURING CORPORATIONS. (*Id.*)
MUNICIPAL CORPORATIONS. (*Id.*)
RAILROAD CORPORATIONS. (*Id.*)

8. When trustees of a manufacturing corporation, under the act of the legislature, of April 16, 1852, "to facilitate the dissolution of manufacturing corporations in the county of Herkimer," &c., (*Laws of 1852, ch.*, 261,) or the act of April 12, 1853, making the former act applicable to similar corporations in Cayuga county, (*Laws of 1853, ch.*, 179,) shall have proceeded to declare the company insolvent, and to make an assessment upon the stockholders as for a deficiency, objections to the mode in which the trustees have made the assessment, and to the considerations which they took into view and upon which they acted in determining the amount necessary to be assessed, being questions as to whether or not they erred in their determination as to the proper amount of the assessment, cannot arise in an action by the trustees to recover the amount of an assessment. (*Hurd agt. Tollman*, 60 Barb., 272.)

9. If the assessors had jurisdiction to proceed and make the assessment, errors committed by them in neglecting to assess on some stock, in assessing stock not liable to assessment, and in determining the amount of the assessment, should be corrected by an application to the court, under the statute, which provides that the trustee shall be under the direction and control of the supreme court, on their own application or that of any creditor. (*Id.*)

10. A foreign corporation sold its property and distributed the avails among its stockholders:

Held, that the plaintiff, after execution, returned *nulla bona* upon a judgment against the corporation, recovered after the distribution, but on a claim previously existing, might maintain an action in equity, for the amount of the judgment, against one of the stockholders, who had received, upon the distribution, more than the sum due upon the judgment. (*Bartlett agt. Drew*, 4 Lansing, 444.)

See ACTION. (4 Lansing.)
ADVERSE POSSESSION. (*Id.*)
ECCLESIASTICAL CORPORATIONS. (*Id.*)

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INSURANCE. (*Id.*)
 JUROR. *Id.*
 RAILROAD COMPANY. (*Id.*)
 RELIGIOUS CORPORATIONS. (*Id.*)

COSTS.

1. It has repeatedly been decided that a plea of *license* does not raise a question of *title to land*. And where there is no *certificate* of the judge who tried the cause that title came in question on the trial, the court must assume, for the purpose of the question as to who is entitled to *costs*, that the question of title was not raised either in the pleadings or on the trial. (*Turner* agt. *Van Eiper*, ante, 33).
2. Where an action is brought to recover treble damages for trespass on land, &c., pursuant to title 6, ch., 5, 3d part of the Revised Statutes (2 R. S., 2d ed., 261, § 1, &c.), and the plaintiff claims \$1080, but recovers only \$5, the defendant is entitled to *costs*. (*Id.*)
3. This provision for costs in the Revised Statutes, in these actions, is *repealed* by the Code. (*Id.*)
4. Although the Code does not, in terms, provide for costs in actions of trespass on land, yet, as it provides for costs in actions of ejectment and in actions in which title to real estate shall come in question, and is silent as to actions of trespass, it must be assumed that that class of actions was intended to be embraced by some other provision, if any is applicable to it. (*Id.*)
5. The only other provision of § 304 which can be said to embrace this class of actions, is the subdivision of said section which gives costs to the prevailing party in actions for the recovery of money, when the plaintiff recovers \$50. And this subdivision would seem to apply to actions of trespass. (*Id.*)
6. The plaintiff is not entitled to costs under the Revised Statutes because in his complaint he claimed \$1080 damages, an amount exceeding the jurisdiction of a justice of the peace. (*Id.*)
7. A justice of the peace has jurisdiction of an action on a note or other contract, and in an action of trespass, although the damages claimed may exceed \$200, but because of the amount of the claim, he cannot try it. This description of actions is not that to which sub. 3 of § 304, is intended to apply. The court has jurisdiction of such actions, but not of the particular cases. (*Id.*)
8. It would seem that the courts have heretofore sanctioned this injustice, as to the claim for the amount of damages destroying the jurisdiction of a justice in the action, and the inquiry is whether that rule of law is still in force. (*Id.*)
9. Section 371 of the Code provides for a *modification* of the judgment appealed from—not a *reversal* of the judgment in determining the question of *costs*. (*Moran* agt. *McClernan*, ante, 77).
10. Where the appellant specified in his notice of appeal the grounds of the appeal as follows: 1. The judgment is against the weight of evidence. 2. It is not supported by the evidence. 3. On the evidence the plaintiff was not entitled to recover. 4. The judgment is contrary to law upon the evidence: *Held*, that these grounds contained no specification in which the judgment should have been more favorable to the appellant, unless they be construed as claiming that it should have been in his favor, instead of being against him, which is equivalent to claiming a reversal, which is not contemplated by this section. It was a wholly useless proceeding. (*Id.*)
11. Where judgment was rendered before the justice for the defendant for costs, and the plaintiff appealed to the county court and recovered judgment for \$60 and costs; and in his notice of appeal alleged that the judgment should have been in his favor and against the defendant, and there was no evidence to warrant the judgment: *Held*, that this specification of the particulars in which the judgment should have been more favorable to the appellant, did not call upon the defendant to make an offer to modify the judgment, as such specification indicated only a wish to have the judgment vacated, and another entered in his favor, which was not authorized by § 371 of the Code (*See Moran* agt. *McClernan*, ante, 77.) (*Colbert* agt. *Hall*, ante, 80).
12. But the plaintiff, being the prevailing party in the county court, was entitled to costs. (*Id.*)
13. The defendant, in his notice of appeal to the county court, alleged that the judgment of the justice for \$169 25 damages and \$8 05 costs against him, should have been more favorable to him in the following respects:
 1. It should have been in his favor, and against the plaintiff, for \$200.
 2. It should have been in his favor,

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- and against the plaintiffs, for damages and costs.
3. It should have been for a less sum, to wit, for only \$50 against appellant.
4. It should have been for a less sum, to wit, for only \$75. (*Wadley agt. Davis, ante, 82*).
14. On the trial before a referee in the county court, the plaintiffs recovered judgment for \$155 27 damages, or \$13 98 less than the recovery before the justice.
- Held*, that the plaintiffs were entitled to costs. (*Id.*)
15. This court has decided at the present term, in the case of *Moran agt. McClearn* (*ante, p. 77*), and in *Colbert agt. Hall* (*ante, p. 80*), that a specification that the judgment should have been for the appellant instead of the respondent, was not admissible under section 371 of the Code. (*Id.*)
16. This court has also decided, in *Putnam agt. Heath* (44 *How.*, 262), that a specification in the notice of appeal that the judgment should have been more favorable in two sums of different amounts, was not a compliance with that section. (*Id.*)
17. Where the decision of the court, filed in the action, directs judgment in favor of the defendants against the plaintiff, who sues as administrator, it allows the costs to be taxed, and charged upon, and collected out of the estate represented by the administrator; and, in the absence of a special order made for mismanagement, they cannot be collected out of the administrator personally. (*Laudelay agt. Deafendorf, ante, 90*).
18. Where the plaintiff allowed sixteen months to elapse after his summons and complaint were served upon one of the defendants before he caused the same to be served on the other defendant, thus rendering it necessary that two answers should be prepared, though they contained substantially the same defenses; for that reason, each defendant allowed the costs before notice of trial, and disbursements prior to issue being joined by service of the answer of the defendant last served. (*Id.*)
19. On a reference to ascertain the rights of claimants to surplus moneys in a mortgage foreclosure case, the claimants are entitled to the fees of the referees and fees of the clerk in the proceeding. (*Blwell agt. Robbins, ante, 108*).
20. The only costs, aside from disbursements, that can be allowed the claimants, at the rate allowed for similar services in civil actions, are such as are prescribed by the Code. (*Id.*)
21. In this case, the claimants are entitled to costs for two motion fees of \$10 each. One for the appointment of the referees and the other for the confirmation of his report. (*Id.*)
21. It seems, that there may be cases in which it would be proper to allow a trial fee, before the referee. These are special proceedings and costs may be allowed in the discretion of the court, (*Id.*)
22. The defendant appealed from a judgment of a justice of the peace, rendered against him for \$95 damages and \$5 costs, to the county court, and he in his notice of appeal stated that "the judgment should have been more favorable to him in this particular, to wit: That said judgment should not have been for more than \$25, damages besides costs." The plaintiff did not serve any order to modify the judgment of the justice. (*Youngmans agt. Fingar, ante, 159*).
23. The plaintiff obtained a verdict in the county court for \$49 damages. The county court held and ordered that the plaintiff should recover costs in such court. The defendant appealed to this court, from such order of the county court, and this court affirmed the order. (*Id.*)
24. The defendant thereupon appealed from the last mentioned order, to the court of appeals: That court held unanimously (by a written opinion) that the order was erroneous, and that the defendant was entitled to costs in the county court; for the reason that the plaintiff did not serve an offer to modify the judgment of the justice. But dismissed the appeal on the ground that such order was not appealable. (*Id.*)
25. On a motion thereafter by the defendant, at general term of this court, for a reargument therein, whether the plaintiff or the defendant was entitled to costs, in the county court:
- Held*, that it would be disrespectful to the court of appeals to disregard the opinion of that court, on the ground that such opinion is not absolutely controlling, because that court dismissed the defendant's appeal there. It was undoubtedly delivered with a view of putting at rest the question as to which party should recover costs in the

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county court in cases like this, as the decisions of this court have been conflicting in different districts on the question:

Held, also, that in accordance with the opinion of the court of appeals, a re-argument of the question, be granted, and that the defendant is entitled to costs in the county court, and that the order of the county court allowing costs to the plaintiff, be reversed, and that the defendant have a judgment for costs in that court, &c. (*Id.*)

26. On appeal from the judgment of an inferior court to the general term of the supreme court, if the judgment is affirmed with costs, the respondent is entitled to have the interest on the judgment below from the time of its rendition to the time of entering judgment of affirmance, taxed by the clerk and inserted with the costs of appeal. (*Buck* agt. *City of Lockport*, ante, 283.)

27. The sheriff is entitled to but one fee of fifty cents for receiving and entering an execution in his books and searching for property. He cannot charge one such fee under the act chap. 225, laws of 1850, § 1, and another under chap. 415, laws 1871, § 1, sub. 4. (*Id.*)

28. Whenever a party obtains the postponement of the trial of a cause, on payment of costs, his adversary may insist on having the trial proceed, on omission to pay; or he may waive that right, and either compel payment by precept in the nature of a *fiat facias*, or include them in his general bill. In case he ultimately succeeds in the action. (*Gamble* agt. *Taylor*, ante, 375.)

29. Where the defendant put the cause over the circuit upon an order "that said cause go over the term, on payment of costs by said defendant, to the plaintiff or her attorney, of said term, and witnesses fees," and the defendant thereafter paid to plaintiff's attorney \$10 50-100 which was all the term costs, except witnesses fees, which were left for future adjustment, and on such adjustment by the court, such fees were fixed at \$50, and the plaintiff having ultimately succeeded in the action:

Held, that the plaintiff was entitled to have the balance of the costs of the circuit \$50, included in the judgment, as part of the costs in the action—ordered accordingly. (*Id.*)

29. Where an appeal has been brought to the county court from the judgment of the court of a justice of the peace, under section 271 of the Code, and

plaintiff has served an offer to reduce the judgment to a certain amount, which is not accepted, interest added by a jury or by the court to the damages cannot be estimated, in determining whether the judgment in the county court is more favorable to the appellant than the offer of the respondent, and if the damages not including the interest would warrant a judgment more favorable to the defendant by more than ten dollars than the unaccepted offer of plaintiff, defendant is entitled to costs. (*Pike* agt. *Johnson*, 47 N. Y., 1.)

30. Where, in an action upon contract tried by a referee, the recovery is less than fifty dollars, the question whether or not it was an action of which a court of justice of the peace had jurisdiction, under subdivision 4 of section 54 of the Code, must be determined by the facts found by the referee, which are conclusive upon the parties for that purpose, and upon those facts the law determines the question of costs. (*Fuller* agt. *Conde*, 47 N. Y., 89.)

31. Plaintiff recovered judgment in justices' court for ninety-five dollars damages and costs. Defendant appealed to the county court, stating his grounds of appeal, "that judgment should have been more favorable to him in this particular, to wit: that said judgment should not have been for more than twenty-five dollars damages, besides costs." Plaintiff made no offer to modify judgment, and recovered in the county court forty-nine dollars damages:

Held, that defendant was entitled to costs of the appeal. (*Younghans* agt. *Fingar*, 47 N. Y., 99.)

32. In an action brought by a husband against the wife, to have the marriage declared void by reason of her former marriage, upon the final hearing and decision in favor of the wife, the court has power to award her extra expenses and counsel fees beyond the taxable costs. (*Griffin* agt. *Griffin*, 47 N. Y., 134.)

33. The court of original jurisdiction may, in its discretion, require the plaintiff in an action, suing as an executor, administrator, or trustee of an express trust, to give security for costs under section 317 of the Code at any time during the pendency of the action, either before trial and judgment or pending an appeal to the general term of the court from a judgment. The court may require such security for the costs already accrued or entered on the

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judgment appealed from as well as those that shall thereafter accrue, or limit the requisition to costs that shall accrue in the future. (*Gedney* agt. *Purdy*, 47 N. Y., 676.)

See USURY. (60 Barb.)

35. Where the defendant, before answering in a justice's court, offered in due form under section 64, subdivision 15, of the Code, to allow judgment against him for a certain sum, and upon plea of title the action was discontinued and brought in the supreme court:

Held, that the action here was identical with that in the justice's court, and the defendant entitled to costs on recovery by the plaintiff of less than the sum offered. (*Niagara Falls Suspension Bridge Co.* agt. *Buckman*, 4 Lansing, 323.)

See EXECUTION. (4 Lansing.)

COUNTY.

See BOARD OF SUPERVISORS. (46 N. Y.)

COUNTY BONDS.

1. A county bond issued to obligee or bearer possesses all the elements of commercial paper, and is subject to all the rules which pertain to commercial paper, and a purchaser and holder thereof, is entitled to all the rights which attach to negotiable instruments. (*Lindsley* agt. *Diessendorf*, ante, 357.)
2. A purchaser of such a bond, in good faith, for full value, and without notice, possesses a perfect title thereto by delivery. (*Id.*)
3. An action and an injunction order restraining the party in possession of such bond from negotiating or disposing of it, is not notice to a subsequent bona fide purchaser for value, in the nature of *lis pendens* at common law, as such notice does not apply to commercial paper, the title to which passes from hand to hand by delivery. (*Id.*)

COUNTY CLERK.

See JUDGMENTS. (4 Lansing.)

COUNTY COURT.

See COSTS. (47 N. Y.)

COUNTY OFFICERS.

See COUNTY CLERK. (4 Lansing.)

COUNTY JUDGE. (*Id.*)

SHERIFF. (*Id.*)

SUPERVISORS. (*Id.*)

COUNTER-CLAIM.

1. In action brought to recover damages, for the alleged unauthorized sale of stock, the answer setting up a counter-claim, it was proper for the referee to state an account between the parties, and to give judgment in favor of defendants for any balance found due them on account of stocks purchased for plaintiff. (*Stewart* agt. *Drake*, 46 N. Y., 449.)

PRACTICE. (47 N. Y.)

EQUITY. (60 Barb.)

DEFENSES. (4 Lansing.)

INSURANCE. (*Id.*)

TRUSTS AND TRUSTEES. (*Id.*)

COUNTY JUDGE.

1. A motion to dissolve an injunction, may be made before answer put in (*Town of Middletown* agt. *The Rondout & Owego R.R. Co.*, ante, 144.)
2. A county judge has no power or jurisdiction, on granting an injunction *ex parte*, to grant an order to show cause, returnable before himself, why such injunction should not be continued. (*Id.*)
3. A county judge cannot hear a contested motion as to an injunction; because it requires the motion on notice to vacate shall be made before the court; and to show cause why the injunction should not be continued, being equivalent to a notice of motion for that purpose, he has no jurisdiction. (*Id.*)
4. Where a county judge grants an *ad interim* order of injunction, with an order to show cause returnable before him on a certain day, why such injunction should not be continued, by a non-appearance of the parties before him to show cause on the day specified, the injunction ceases, and there is none to be vacated. (*Id.*)
5. The business which corporations were created to carry on is not to be suspended, nor are their directors to be restrained from the discharge of their different duties, except by the court and upon notice. (*Id.*)
6. On an examination of a party as a witness under sections 390 and 391 of the Code before a county judge, the judge has the power to compel the party to answer any and all questions which the judge shall determine relate to the issues raised by the pleadings in the action. (*Mudge* agt. *Gilbert*, ante, 219.)

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7. Where the defendant is examined he may be compelled to answer questions relating to the defense interposed by him, and not pertinent to the affirmative claim made in the plaintiff's complaint, as well as to such facts as are essential to enable the plaintiff to make out his case as alleged in the complaint (*Id.*)

8. A county judge has authority to make an order out of court—at chambers—to stay proceedings on a judgment until the hearing and decision of a motion for a new trial in the county court. (*Ward agt. Bundy, ante, 330.*)

See COMMON SCHOOLS. (60 *Barb.*)
RAILROAD MUNICIPAL BONDS. (4 *Lansing.*)

COURT OF APPEALS.

1. The circumstance that an appeal has been taken from the decision of the court of appeals to the supreme court of the United States, cannot absolve this court from following the decision. By this court the decision of the tribunal of last resort of the state must be considered the law of the land, until it shall have been reversed. (*Rochester and Geneva Valley Railroad agt. The Clarke National Bank, 60 Barb., 234.*)

See APPEAL. (4 *Lansing.*)

COURT OF COMMON PLEAS OF NEW YORK CITY.

See ACTION. (47 *N. Y.*)
EQUITY. (*Id.*)
JURISDICTION. (*Id.*)

COURTS OF OYER AND TERMINER.

1. Since the adoption of the constitution of 1846, the organization of courts of oyer and terminer is within the control of the legislature, with the single exception that a justice of the supreme court must be a member of the court, and must preside. (*Smith agt. People, 47 N. Y., 330.*)

2. The legislature may associate other judicial officers with the presiding justice, or provide for commissioners to act with him, to allow him to preside without associates, making him the sole judge of the court. The word "preside," as used in section 6 of article 6 of the constitution of 1846, and in section 7 of the same article as amended in 1869, does not necessarily imply that he must have associates. (*Id.*)

3. Those portions of the acts of 1853 and 1857 (chapter 217 and 352, laws of 1853, and chapter 446, laws of 1857), amended the charter of the city of New York, permitting courts of oyer and terminer in and for the city of New York, to be held by a justice of the supreme court alone, were not repealed by the general repealing clause in the "act to reorganize the local government of the city of New York." (§ 120, chap. 137, laws of 1870.) (*Id.*)

4. The Code of 1848, did not supersede the provisions of the judiciary act of 1847 (chapter 280, laws of 1847), organizing the courts of oyer and terminer throughout the state. The provisions of section 24 of that act, and of section 17 of the Code substituted therefor, have no relation to the organization and composition of several courts, but simply provide for an apportionment of the business among the justices of the supreme court, and a designation of the time and place of holding the different courts. (*Id.*)

COURT OF SESSIONS.

See INDIGENT PERSONS. (47 *N. Y.*)

CREDITORS.

1. There is no propriety in allowing one creditor to make a motion for a receiver and, by stipulation with the attorney for the defendants, to allow the proceedings to lie dormant for months, until other creditors proceed to collect their claims, and then, by consent of the attorney, attempt to gain a priority. (*Matter of the National Mechanics' Banking Association agt. The Mariposa Company, 60 Barb., 433.*)

2. The rule which is applied to dormant executions should be applied to such proceedings, and the vigilant creditor should be allowed priority; especially when it is apparent, from all the facts in the case, that there has been collusion in regard to the prosecution of the claim of one creditor, to defeat the claim of the other. (*Id.*)

See HUSBAND AND WIFE. (60 *Barb.*)

CREDITORS' ACTION.

See ARREST. (4 *Lansing.*)

CREDITORS' SUIT.

1. An action in the nature of a judgment creditor's bill is still allowable, under the Code. (*Bartlett agt. Drew, 60 Barb., 648.*)

Digest.

CRIMINAL LAW.

See FALSE STAMPS AND TRADE MARKS. (47 N. Y.)

1. A party convicted of a misdemeanor, and sentenced to imprisonment, has a right to be heard upon an application to be let to bail, under the Revised Statutes. (1 R. S., 765, § 19, *Edm. ad.*); even after the execution of the judgment has commenced; where a writ of error has been allowed, with a direction that it shall operate as a stay of the execution of the judgment. (*The People agt. Folmestee*, 60 Barb., 480.)
2. The office of a writ of *certiorari*, in a criminal case, issued under the provisions of the Revised Statutes, after trial and before judgment, is only to bring up the indictment, the proceedings on the trial, and any bill of exceptions that may have been taken; and it presents for view only the questions arising on the indictment and bill of exceptions. (*The People agt. Beagle*, 60 Barb., 527.)
3. In criminal cases, exceptions can be taken only on the trial, and to the rulings of the court as to the admission or rejection of evidence, or upon other questions presented on a trial before a jury, and not in any case to the judgment or order of the court upon a demurrer. (*Id.*)
4. By the common law, husband and wife cannot be witnesses for each other. The provisions of the Code of Procedure do not apply to proceedings under the criminal law. And the act of 1869, (ch. 678,) allowing persons charged with crime to be witnesses in their own behalf, relates only to the party charged with crime. Hence, upon the trial of an indictment, the prisoner's wife is an incompetent witness for him. (*Id.*)

See EVIDENCE. (4 Lansing.)
INDICTMENT. (*Id.*)

CRIMINAL TRIAL.

See FALSE PRETENSES. (47 N. Y.)
TRIAL. (*Id.*)

D.

DAMAGES.

1. Interest upon the value of property lost or destroyed, by the wrongful or negligent act of defendant, is a proper

item of damages. (*Parrott agt. K. and N. Y. Ice Cos.*, 46 N. Y., 361)

2. Where, under sec. 165 of the Code, defendant in an action of libel or slander pleads the truth of the matter charged as defamatory, and also matters in mitigation, the allegations in justification, although unsupported by proof, are no longer evidence of malice, to be considered by the jury and taken as enhancing plaintiff's damages. (*Klinck agt. Colby*, 46 N. Y., 427.)
 3. In action against a common carrier for a failure to transport and deliver goods in accordance with his contract, the measure of the damages is the value of the goods at the place of destination, at the time they should have been delivered pursuant to the contract, and in the condition the carrier undertook to deliver them, less the price to be paid for his services. (*Sturges agt. Bissell*, 46 N. Y., 462.)
 4. An action can be maintained by the owner of land for an entry thereon and ouster, but damages can only be recovered for the simple entry and ouster, and not for the continuation of the trespass. Those damages are only recoverable after the possession has been regained. (*CHURCH, Ch. J., GROVER and ALLEN, JJ., concurring.*) (*Wohler agt. The B. and L. S. E. E. Co.*, 46 N. Y., 686.)
- See EVIDENCE. (46 N. Y.)
JURISDICTION. (*Id.*)
5. In the absence of any special contract, the law implies an agreement upon the part of a common carrier to transport merchandise within a reasonable time. If he negligently omits so to do, and the market value of the merchandise falls, the measure of damages is the difference in its value at the time and place it ought to have been delivered, and at the time of its actual delivery. (*Ward agt. N. Y. O. E. R. Co.*, 47 N. Y., 29.)
 6. Exemplary damages may be allowed in actions based upon negligence, where such negligence is so gross and culpable as to evince utter recklessness. (*Caldwell agt. N. J. Steamboat Co.*, 47 N. Y., 282.)
 7. Corporations are not exempt from punitive damages in a proper case. (*Id.*)
 8. In an action brought to recover damages for the death of a child three years old, under the provisions of chapter 450, Laws of 1847, as amended by chapter 256, Laws of 1849, the absence of proof of special pecuniary

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damage resulting from the death of the child will not justify the court in nonsuiting the plaintiff or in directing the jury to find only nominal damages. (*Thl* agt. 42d St. and G. S. F. E. Co., 47 N. Y., 372.)

See CONTRACTS. (47 N. Y.)
FRAUD. (*Id.*)
WARRANTY. (60 Barb.)

2. In replevin for a horse, the plaintiff gave bonds and obtained the property, which was retaken by the defendant on security given by him. No ground for exemplary damages to plaintiff was shown. The court charged that if the plaintiff recovered, he was entitled, to actual damages for detention, to recover for use of the horse :

Held, that the charge was error. *Twinam* agt. *Swart*, (4 Lansing, 263.)

See ASSESSORS. (4 Lansing.)
CHATTEL MORTGAGE. (*Id.*)
FEDERAL COURTS. (*Id.*)
HIGHWAYS AND STREETS. (*Id.*)
RAILROAD COMPANY. (*Id.*)
SALE OF CHATTELS. (*Id.*)

DEBTOR AND CREDITOR.

See PARTNERSHIP. (47 N. Y.)

1. The law devotes all the property of a debtor, both real and personal, to the payment of his debts; and if a debtor, instead of paying his debts, uses his personal property upon the real estate of another, so that it becomes part of such realty, for the purpose of defrauding his creditors, and preventing them from obtaining satisfaction of their demands out of his property, with the knowledge and consent of the owner of the realty, the judgment creditor may follow the property into the hands of the owner of the premises thus benefited, and fasten his judgment upon such premises, to the extent of the debtor's property therein. (*Isham* agt. *Shaffer*, 60 Barb., 317.)

2. There is a distinction between the property of a judgment debtor, as such, and his gratuitous services in managing his wife's business. (*Id.*)

See CORPORATIONS. (60 Barb.)
CREDITORS. (*Id.*)
FRAUDULENT CONVEYANCE. (*Id.*)
HUSBAND AND WIFE. (*Id.*)
PRINCIPAL AND AGENT. (*Id.*)
VENDOR AND PURCHASER. (*Id.*)
ACTION (4 Lansing.)
INSOLVENCY. (*Id.*)

DECLARATIONS AND ADMISSIONS.

See DEED. (46 N. Y.)
EVIDENCE. (*Id.*)
HUSBAND AND WIFE. (*Id.*)
EVIDENCE. (4 Lansing.)

DECREE.

See FOREIGN JUDGMENT. (46 N. Y.)
JUDGMENT. (4 Lansing.)

DEDICATION.

See LITERARY PROPERTY. (47 N. Y.)

DEED.

1. Permanent and visible monuments referred to in a deed, will control courses, distances, and quantity; but when the monument called for is not found, nor its location or existence proven, the lands must be located by the other parts of the description. And where the grant describes the premises by definite and distinct boundaries, from which the lands conveyed may be located, no extrinsic facts or parol evidence of intent can be resorted to, to control or vary the description. (*Drew* agt. *Swift* 46 N. Y., 204.)

2. In a deed of a flouring mill and premises, was contained the following grant: "Together with the privilege of taking from the mill race 375 cubic inches of water under thirteen feet head, when there shall be so much water in said race," etc.:

Held, the deed granted the privilege of taking from the race 375 inches of water and no more, under whatever head the grantee might take it, up to thirteen feet. (*RAPALLO, J.*) (*Terrance* agt. *Conger*, 46 N. Y., 340.)

3. The recital in a deed was in substance, that it was made in pursuance of a contract with A., of whom the grantee was assignee, and as such entitled to the conveyance:

Held, that the legal inference from the facts stated was in support of the title, and there was nothing therein imposing upon a *bona fide* mortgagee, the duty of examining the contract or assignment, for the purpose of ascertaining if there were latent defects in the title, or latent equities in favor of the assignor. (*Acce* agt. *Westcott*, 46 N. Y., 384.)

See EQUIT. (46 N. Y.)
TENANTS IN COMMON. (*Id.*)

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4. It is not within the constitutional power of congress, to prescribe for the States a rule for the transfer of property within them. A deed, therefore, is not invalid because not duly stamped. (*Moore* agt. *Moore*, 47 N. Y., 467.)

See EVIDENCES. (47 N. Y.)

TAX SALES. (*Id.*)

ADVERSE POSSESSION. (60 Barb.)

EJECTMENT. (*Id.*)

HUSBAND AND WIFE. (*Id.*)

LIMITATIONS, STATUTE OF. (*Id.*)

REFORMATION OF DEED. (*Id.*)

DEFENCES. (4 Lansing.)

DOWER. (*Id.*)

EASEMENT. (*Id.*)

EVIDENCE. (*Id.*)

MISTAKE OF LAW AND FACT. (*Id.*)

TRUSTS AND TRUSTEES. (*Id.*)

DEFAULT.

See APPEAL. (4 Lansing.)

DEFENCES.

1. Plaintiff delivered certain negotiable bonds to defendant for sale, who, upon discovering they were stolen bonds, refused to surrender them, but notified the original owner. The latter brought an action to recover possession, and the bonds were taken by the sheriff, by virtue of process therein. After this, action was brought for the conversion of the bonds by defendant, plaintiff was made defendant in the replevin suit.

Held, that latter suit was no defense to this action. (*Welch* agt. *Sage*, 47 N. Y., 143.)

2. Equitable defenses and counter-claims to actions at law are confined to the cases in which a court of equity, if its jurisdiction were invoked by action, would restrain or limit the suit at law, and grant equitable relief against it. (*Cramer* agt. *Benton*, 4 Lansing, 291.)

3. Where a defendant sets up and seeks an adjudication in his favor upon an equitable defense, or counter claim, he is *pro hac vice*, in a court of equity, and must rely upon its principles to maintain his claims. (*Id.*)

4. In an action of ejectment the plaintiff claimed under a deed, with warranty from the defendant's grantees. The defendant pleaded in defense and, against objection, proved a mutual mistake between himself and his said grantees, by which the premises claimed were unintentionally described in his deed to them:

Held, that the defense was in effect, a claim to have the deed to the plaintiff's grantors reformed; and as equity could not decree reformation of that deed in an action to which the grantees therein were not parties, it could not uphold the defense in the action. (*Hicks* agt. *Shepard*, 4 Lansing, 335.)

See BAIL. (4 Lansing.)

BRIDGES. (*Id.*)

CONTRACT. (*Id.*)

DONATIO CAUSA MORTIS. (*Id.*)

EXECUTORS AND ADMINISTRATORS. (*Id.*)

INSOLVENCY. (*Id.*)

INSURANCE. (*Id.*)

ORDER OF COURT. (*Id.*)

STATUTE OF LIMITATIONS. (*Id.*)

USURY. (*Id.*)

DEFINITE AND CERTAIN.

2. A motion to make more definite and certain, under section 160 of the Code, should point out wherein the alleged defect consists. (*Rathbun* agt. *Markham*, ante, 271.)

DELIVERY.

See CONTRACT. (4 Lansing.)

DONATIO CAUSA MORTIS. (*Id.*)

SALE OF CHATTELS. (*Id.*)

DEMAND.

See FORECLOSURE. (4 Lansing.)

DEMISE.

See LEASE. (4 Lansing.)

DEMURRER.

See APPEAL. (47 N. Y.)

PRACTICE. (*Id.*)

TRIAL. (*Id.*)

FORECLOSURE. (4 Lansing.)

DEPOSITION.

1. Section 401 of the Code does not authorize an application for a reference to the deposition of a party to the action under that section. (*Cockey* agt. *Hurd*, ante, 140.)

2. A deposition taken under a commission will not be excluded because an answer to a cross-interrogatory is not full. If such answer is not clearly evasive, a party desirous of eliciting further facts can do so only by obtaining a re-execution of the commission. (*Baker* agt. *Spencer*, 47 N. Y., 562.)

Digest.

DEPOSITOR.

See BANKS AND BANKING. (46 *N. Y.*)

DESCRIPTIO PERSONÆ.

See JUDGMENTS. (4 *Lansing.*)

DESCENT.

See EQUITABLE CONVERSION. (4 *Lansing.*)

DEVISE.

1. A devise to an unincorporated charitable association is void, and is not made valid by the incorporation of such association after the death of the testator. So, also, a subsequent amendment of its charter, imparts no validity to a devise to a corporation, not authorized to take at the time of such death. (*White et al. Exrs. vgt. Howard*, 46 *N. Y.*, 144.)
2. A devise to a corporation organized under the laws of another state, is void, unless it is authorized so to take by a statute of this state, although by its charter it has that authority. (*Id.*)
3. A devise of lands, with power of absolute disposal for the use of the devisee, without anything to qualify the words, is a gift in fee simple. (*Terry vgt. Wiggins*, 47 *N. Y.*, 512.)
4. The word "estate" used in a devise refers to the testator's title, and indicates an intent to give all the estate or interest in the property which the testator can dispose of by will, unless by express terms or by necessary implication it appear that it was used as descriptive of or referring to the corpus of the property, but it may be controlled by other portions of the will. (*Id.*)
5. By a clause in the testator's will he devised as follows: "I give and devise to my son N. the K. farm, as it is now occupied by him, to be held and enjoyed by him" for life; "and after the death of my said son N., I give and devise the said K. farm to his children." Before the date of the will the K. farm had been divided by a surveyor's line, the son occupied that portion of the farm on one side of the line; and whether he or the testator occupied the other portion was in dispute: *Held*, that conceding the son's occupation to have been only of one portion of the farm, the whole passed to him under the devise. (*Sharp vgt. Dinmick*, 4 *Lansing*, 496.)
6. A testator devised his real and per-

sonal estate to his wife for her use and benefit until his youngest child should be twenty-one; or, in case such child should not attain that age, until the age of his next youngest child should reach twenty-one; when he directed his estate to go one third to his widow and the remainder among his children. The testator had three children:

Held, that upon the testator's decease the widow took an estate of inheritance in one third of the estate, and for years in the other two thirds; and the children a vested remainder in fee descendible, devisable, and alienable by them. (*Tracy vgt. Ames*, 4 *Lansing*, 500.)

See ADVERSE POSSESSIONS. (4 *Lansing.*)

DILIGENCE.

See SALE OF CHATTELS. (4 *Lansing.*)

DIRECTORY STATUTE.

See LOAN COMMISSIONERS. (4 *Lansing.*)

DISCHARGE.

See BANKRUPT ACT. (46 *N. Y.*)

DISCHARGE OF JUDGMENT.

See JUDGMENTS. (4 *Lansing.*)

DISCHARGE IN INSOLVENCY.

See INSOLVENCY. (4 *Lansing.*)

DISCRETION.

See APPEAL. (46 *N. Y.*)
APPEAL. (4 *Lansing.*)

DISCONTINUANCE.

See COSTS. (4 *Lansing.*)

DISLOYALTY.

See CONTRACT. (4 *Lansing.*)

DISQUALIFICATION.

See BASTARDY PROCEEDINGS. (4 *Lansing.*)

DISTRIBUTION.

See ARREST. (4 *Lansing.*)

DISTRICT COURTS OF THE CITY OF NEW YORK.

See ACTION. (47 *N. Y.*)

Digest.

DITCHES AND DRAINS.

See SURFACE WATER. (4 *Lansing*.)

DIVORCE.

1. In an action for divorce brought by the husband against the wife, for adultery, the defendant is entitled to an allowance as *counsel fees* to enable her to defend the action, where she interposes a defense of recriminatory charges of adultery against the plaintiff, including an act of adultery found against the plaintiff on a former trial, but which was shown to have been condoned by the wife. (*Miller* agt. *Miller*, ante, 125.)
2. And it is no valid objection to such allowance, that the parties to this action, on a former occasion, voluntarily, with the assent of their counsel, entered into an agreement for a separation from bed and board, and for a settlement of all suits between them; and that the husband in pursuance of that agreement transferred and delivered to the wife some \$2,000, in property which she agreed to receive and accept in lieu of dower, and of all right in his property and "in full for all future charges or liabilities for her support." (*Id.*)
3. A decree of divorce obtained in another state, the defendant not being served with process, and both parties at the commencement of the suit and during its pendency being residents of this state, is invalid. (*Hoffman* agt. *Hoffman*, 46 *N. Y.*, 30.)
4. A decree of divorce, granted by a court in Ohio, where neither of the parties, in fact, resided at the time, without any appearance by the defendant, or notice to him, except the publication of a notice to appear, in a newspaper, is not valid and binding here, so as to annul a marriage solemnized in this state. (Following the decision of the court of appeals, in *Kerr* agt. *Kerr*, 41 *N. Y.*, 273.) (*Phelps* agt. *Baker*, 60 *Barb.*, 107.)
5. If such a decree contains a direction for the payment of alimony, it is void in this state, as to the alimony, whatever its effect may be upon the marriage; and will furnish no foundation for an action here to recover the alimony awarded by it. (*Id.*)
6. A decree of divorce, a *vinculo matrimonii*, granted in Iowa, for cruel and inhuman treatment and desertion, before the plaintiff has obtained a residence in that state, the cause occur-

ring while the parties were domiciled here, and the defendant never having resided in Iowa, is not valid for any purpose here. (*Holmes* agt. *Holmes*, 4 *Lansing*, 388.)

7. Service of the process of an Iowa court, in this state, gives no jurisdiction to such court to decree a divorce. (*Id.*)

See APPEAL. (4 *Lansing*.)EVIDENCE. (*Id.*)EXECUTION. (*Id.*)ORDER OF COURT. (*Id.*)

DOCKET OF JUDGMENT.

See JUDGMENTS. (4 *Lansing*.)

DOMICIL.

See ASSESSMENTS. (4 *Lansing*.)DIVORCE. (*Id.*)EXECUTORS AND ADMINISTRATORS. (*Id.*)

DONATIO CAUSA MORTIS.

1. The delivery of a negotiable security, with intent to give the same *causa mortis*, vests the title in the donee, subject to the rights of the donor's personal representatives to call it in question, for the benefit of creditors, to the extent of their claims. (*House* agt. *Grant*, 4 *Lansing*, 296.)
2. Claims against the donor, presented to his administrator, but not otherwise established, do not, as against the donee, show the existence of debts. (*Id.*)
3. In an action by a donee, *causa mortis*, of a promissory note, payable to bearer, against the maker, who has paid the same to the donor's administrator, without production of the note, the defendant cannot interpose the claims of creditors to defeat the plaintiff's right to recover. (*Id.*)

DONOR AND DONEE.

See DONATIO CAUSA MORTIS. (4 *Lansing*.)

DOWER.

1. A widow who elects to take and accepts a gross sum from surplus moneys paid into court under a judgment of foreclosure, in lieu of her dower right, is entitled to the full sum accepted, free from any costs or commissions on a reference in obtaining it. (*Campbell* agt. *Erving*, ante, 258.)

See MORTGAGE. (46 *N. Y.*)

Digest.

2. Where the wife unites with her husband in conveying an estate in which she is entitled to dower, the conveyance operates as an extinguishment of her right not only with respect to the grantee and his successors in interest, but also as to the third parties. (*Elmendorf* agt. *Lockwood*, 4 *Lansing*, 393.)

DRAFT.

- See* BILLS OF EXCHANGE. (46 *N. Y.*)
See ASSIGNMENT. (4 *Lansing*.)

DRAINAGE.

- See* EASEMENT. (47 *N. Y.*)

DRAMATIC COMPOSITION.

- See* LITERARY PROPERTY. (47 *N. Y.*)

DRAWER AND DRAWEE.

- See* ASSIGNMENT. (4 *Lansing*.)

E.

EARNINGS.

- See* PARENT AND CHILD. (4 *Lansing*.)

EASEMENT.

1. The rule of law which creates an easement in favor of one or two tenements or heritages belonging to a single owner, upon the sale of one of them, is confined to cases where there is an apparent sign of servitude on the part of the other, which would indicate its existence to a person reasonably familiar with the subject upon an inspection of the premises. The owner of two adjoining houses and lots in the city of New York, known as Nos. 83 and 85, built a vault half in the lot of each, extended the division fence over the center of the vault, and then erected an out house for each dwelling, on either side of the fence, over the vault. A drain from the vault ran through the lot of No. 85. Defendant purchased No. 85 receiving a full covenant deed without reservation. After that, plaintiff purchased No. 83. Defendant closed up the drain:

Held, the servitude was not apparent, and no easement existed in favor of No. 83. (*Butlerworth* agt. *Crawford*, 46 *N. Y.*, 349.)

2. The presumption of law that when the owner of a whole tenement

divides the same and conveys a portion, the parties contract with reference to the visible physical condition of the property at the time, may be repelled by actual knowledge on the part of the contracting parties of facts, which negative any deduction to be drawn from the apparent condition. Where there is proof of such knowledge, they are presumed to have contracted not solely with reference to its condition, as it would have been presented to a stranger, but as it was known to be by the parties. (*Simmons* agt. *Cloonan*, 47 *N. Y.*, 3.)

3. The owner of the soil upon which surface waters stand or through which they soak, has the right to lead them off in such direction and in such quantity as he sees fit, taking care only that he does not injure his neighbor by discharging them upon him in an unusual quantity or at an unusual place, and has the right, at his pleasure, to change the direction of the drainage. But where the owner of a tract of land, upon which was a marsh, has dug a ditch therefrom through other portions of the tract, making a permanent channel in which the waters gathered in the marsh flow in a continuous stream, mutually benefiting the lands drained and the lands to which is conveyed a supply of good water, and subsequently and while these reciprocal benefits and burdens were existing and apparent, has divided the tract into parcels, and conveyed the parcels to different grantees, who contracted with reference to such a condition of the lands, the respective grantees have no right to change the relative condition of one parcel to the injury of another. (*Curtis* agt. *Ayrault*, 47 *N. Y.*, 73.)

4. The owner of an assessment by reservation has no greater rights under it than he would have if acquired by grant, and is limited to such use of it as is reasonably necessary to its enjoyment. (*Huson* agt. *Young*, 4 *Lansing*, 63.)

5. The owner of a brick building, conveyed, without reservation, to the owner of an adjoining lot, the land upon which the half of one of the side walls of the building stood, the grantee made no use of the wall for ten years, and then built against it, and the wall was used by him and by the grantor, and the latter's grantee of the building, for ten years more, as a party wall:

Held, that such grantees had a right in the wall as a party wall. (*Brooks* agt. *Curtis*, 4 *Lansing*, 283.)

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6. An easement established by prescription, or inferred from user, is limited to the actual user. (*Id.*)

7. The owner of an easement, by prescription, for support, in a party wall, may not add to the wall by building on it, or occupying the adjoining premises to a greater extent than is established by the user, or is inferable therefrom as a necessary legal incident. (*Id.*)

See PRIVATE WAY. (*Id.*)

ECCLESIASTICAL CORPORATIONS.

See CONTRACT. (4 *Lansing.*)
RELIGIOUS CORPORATIONS. (*Id.*)

ECCLESIASTICAL TRIBUNALS.

See CONTRACT. (4 *Lansing.*)

EJECTMENT.

See DEED. (46 *N. Y.*)

1. In an action to recover the possession of real estate in the occupancy of tenants of one claiming title adverse to plaintiff, the landlord is a necessary party, and the presence of the tenant is not essential to enable him to litigate the title. He may, therefore, waive the defect of the non-joinder of the tenant as a party defendant, and the not taking the objection by demurrer or answer is such a waiver. (*Finnegan* agt. *Carraker*, 47 *N. Y.*, 493.)

2. Defendant (the landlord), at the time of the service of summons and complaint upon him in such an action, told plaintiff's attorney, by whom they were served, that he lived in and was in possession of the house in question, and upon the faith of that statement the attorney served the papers upon him.

Held, that the defendant was estopped from denying that he was in the possession of the premises at the time of the commencement of the action, by his declaration, and by receiving and retaining the complaint, without objection, that he was not the proper party. (*Id.*)

3. In an action of ejectment, where the defendant sets up as an equitable defense a mistake in a deed executed by him, under which the plaintiff claims, a court of equity would not attempt to make a decree altering the legal effect of such deed, unless the other parties to that conveyance, as well as subse-

quent purchasers for value, who have conveyed with warranty, were before it. (*Cramer* agt. *Benton*, 60 *Barb.*, 216.)

4. Though in an action of ejectment, the jury may only be required to answer specific questions of fact where they render a general verdict (Code, § 261), yet by consent they may find upon particular questions of fact, without finding such verdict, and in such case their finding is in the nature of a special verdict. (*Carr* agt. *Carr*, 4 *Lansing*, 314.)

See ACTION. (4 *Lansing.*)
HUSBAND AND WIFE. (*Id.*)
DEFENSES. (*Id.*)

ELECTION OF REMEDIES.

1. Where a party has an election between two inconsistent remedies, he is confined to that which he first chooses. W. and defendant were joint owners of a sloop. Defendant ignoring W.'s rights, sold the whole vessel to M. W., after the sale, took and retained possession. M. thereupon libeled the vessel, as owner, in the United States district court. She was seized by the marshal, and M., having obtained judgment, by default, she was delivered to him. W. assigned his interest, and also his claim against defendant, to plaintiff, who sues for conversion:

Held, that W., having elected to assert his rights, by retaining possession, and refusing to recognize the sale, he and his assignees were precluded from maintaining an action for the conversion. (*Rodermund* agt. *Clark*, 46 *N. Y.*, 354.)

See CAUSE OF ACTION. (46 *N. Y.*)

EMINENT DOMAIN.

See STATUTES. (46 *N. Y.*)

1. Where power is delegated by the legislature to the common council of a city, to authorize the laying of railroad tracks along or across any of its streets, subject to the same claims and compensation for damages to the owners or lessees of adjoining property which is allowed under the general railroad laws, the common council has power to authorize the laying of a branch track from a private elevator across such streets to the track of a railroad, to be run by the railroad company for the transportation of grain, &c., to and from the elevator. It is not requisite that the ordinance giving the authority should provide for compensation, as that is provided

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for in the act. (*Clarks agt. Blackmar*, 47 N. Y., 150.)

See LIEN. (47 N. Y.)
HIGHWAYS AND STREETS. (4 *Lansing.*)

ENEMY.

See CONTRACT. (4 *Lansing.*)

ENLISTMENT.

See TOWNS. (4 *Lansing.*)
PARENT AND CHILD. (*Id.*)

ENTRIES.

See JUDGMENTS. (4 *Lansing.*)

EQUITABLE COUNTER-CLAIM.

See DEFENSES. (4 *Lansing.*)

EQUITABLE DEFENSE.

See EJECTMENT. (60 *Barb.*)
EQUITY. (*Id.*)
LIMITATIONS, STATUTE OF. (*Id.*)
DEFENSES. (4 *Lansing.*)

EQUITABLE ASSETS.

See GARRETT agt. SCHEFFER (mem. 47 N. Y., 656.)

EQUITABLE ASSIGNMENT.

See ASSIGNMENT. (4 *Lansing.*)

EQUITABLE CONVERSIONS.

See WILLS. (46 N. Y.)

1. Mere discretionary power, given executors, to sell and convey real estate, does not operate as an equitable conversion thereof. (*McCarty agt. Deming*, 4 *Lansing*, 440.)

2. Where executors were given power, by the will, to sell and convey real estate, and the purpose of the sale was evidently to enable them to satisfy bequests which were void:

Held, that their authority to sell was not to be construed as a direction to convert the real into personal estate, for distribution among the testator's next of kin, some of whom were aliens; but that the real estate descended, as such, to his heirs-at-law entitled to take, as citizens of the United States. (*Id.*)

EQUITABLE ESTOPPEL.

See ESTOPPEL. (4 *Lansing.*)

EQUITABLE JURISDICTION.

See DEFENSES. (4 *Lansing.*)
ESTOPPEL. (*Id.*)
NE EXEAT. (*Id.*)

EQUITABLE LIENS.

1. An equitable claim of land, which existed prior to the recovery of a judgment, is given a preference over judgments docketed afterwards; but in no case is that preference given where the equitable right did not exist prior to the recovery of the judgment. (*Cook agt. Kraft*, 60 *Barb.*, 409.)

2. There is no principle of equity by which a purchaser of real estate, or of a lease which, at the time of the purchase, is subject to the lien of a judgment can claim that improvements subsequently made by him, although with out knowledge of the judgment, are exempt from the lien. (*Id.*)

EQUITABLE MORTGAGE.

See EQUITY. (46 N. Y.)
MORTGAGEE. (*Id.*)
MORTGAGE OF REAL ESTATE. (4 *Lansing.*)

EQUITABLE RELIEF.

See CORPORATION. (4 *Lansing.*)
DEFENSES. (*Id.*)
NE EXEAT. (*Id.*)
NOTES AND BILLS. (*Id.*)
MISTAKE OF LAW AND FACT. (*Id.*)

EQUITY.

1. While equity may not interfere to secure to a party a legal right of no value, it will not interpose to restrain him from enforcing such a right. (*Clin-ton agt. Myers*, 46 N. Y., 511.)

2. The rule that a deed absolute upon its face, can in equity, be shown by parol or other extrinsic evidence, to have been intended as a mortgage has been, upon the fullest consideration, deliberately established in this state, and will not be departed from. (*Horn agt. Keteltas*, 46 N. Y., 605.)

3. The rule, "that he who asks equity, must do equity," will be applied where an adverse equity grows out of the controversy before the court, or out of circumstances which the record shows to be a part of its history, or where it is so connected with the cause as to be presented in the pleadings, and proofs, with full opportunity afforded the party thus recriminated, to explain or refute

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the charges. (*Comstock agt. Johnston*, 46 N. Y., 615.)

4. A court of equity cannot grant relief upon the sole ground of a mistake of law. (*Jacobs agt. Moranye*, 47 N. Y., 37.)

5. Defendant obtained judgment against plaintiff in the Marine court of the city of New York. Plaintiff carried it for review to the court of common pleas, of that city, where judgment was reversed. Subsequently the court of appeals decided that the common pleas had no jurisdiction of a case from the marine court, until it had been first heard and decided by the general term of that court. The defendant issued an execution upon his judgment in the marine court. Plaintiff, thereupon, instituted this action in equity, and obtained a judgment granting a perpetual stay of defendant's proceedings, on the ground that the judgment in the marine court was erroneous, and that the parties had acted under a mutual mistake of law in the review of the common pleas.

Held, error. (*Id.*)

EQUITY OF REDEMPTION.

See CHATTEL MORTGAGE. (47 N. Y.)

CHATTEL MORTGAGE. (4 *Lansing*.)

ERROR.

See JUDGE'S CHARGE. (4 *Lansing*.)
PUBLIC OFFICER. (*Id.*)
QUESTION OF FACT. (*Id.*)

ESCAPE.

See NE EXEAT. (4 *Lansing*.)
ORDER OF COURT. (*Id.*)

ESTATE.

See LANDLORD AND TENANT. (60 *Barb.*)

ESTATES AND LANDS.

See TRUSTS AND TRUSTEE. (4 *Lansing*.)

ESTOPPEL.

1. One party to a contract is not estopped from enforcing it, by the execution of an instrument purporting to cancel the contract for a consideration, where none in fact is received by him, and the act is induced by the false representations of the agent of the other

party, although the latter has acted upon the faith of the declarations contained in said instrument, in settling the accounts of the agent. (*Holden agt. Putnam Fire Ins. Co.*, 46 N. Y., 1.)

2. Where the owner of property confers upon another an apparent title to, or power of disposition over it, he is estopped from asserting his title as against an innocent third party, who has dealt with the apparent owner in reference thereto, without knowledge of the claims of the true owner. The rights of such third party, do not depend upon the actual title or authority of the one with whom he dealt, but upon the act of the owner which precludes him from disputing the title or authority he has apparently conferred. (*McNeil agt. The Tenth Nat. Bank*, 46 N. Y., 325.)

See ELECTION OF REMEDIES. (46 N. Y.)
EJECTMENT. (47 N. Y.)
LIMITATION OF ACTIONS. (*Id.*)

3. Where the defendant having obtained, by user, the right to the half of a wall which adjoined his premises, as a party wall, by consent of the plaintiff, the owner of such half placed anchors in the wall for the purpose of carrying it up, and also built up the whole wall, and added additional stories to his house, with knowledge, and without objection of the plaintiff:

Held, that the latter was equitably estopped from disputing the right of the former to use and maintain the additional wall as a party wall. (*Brooks agt. Curtis*, 4 *Lansing*, 283.)

ADVERSE POSSESSION. (4 *Lansing*.)
DIVORCE. (*Id.*)
DOWER. (*Id.*)
EVIDENCE. (*Id.*)
EXECUTION. (*Id.*)
MANUFACTURING CORPORATION. (*Id.*)

EVICTION.

See LEASE. (46 N. Y.)
AUSTIN *agt. STRONG* (mem.) (47 N. Y., 679.)

EVIDENCE.

1. Although the rule of evidence seems to be settled that if testimony for a plaintiff being unimpeached, is to be believed, that testimony for the defendant, which does not conflict with the plaintiff's testimony, and is also unimpeached, must be equally believed; yet where there appears in the case anything which tends to the impeachment of the witnesses' credibility, such

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as want of intelligence or of memory—not that it is necessary to find the testimony false—the finding of the referee, court or jury will not be disturbed as to the fact, any more than a finding in regard to any other fact in the case. (*Stafford* agt. *Leamy*, ante, 40.)

2. Therefore held, that if in the testimony of the defendant's witnesses in this case, there were anything which tends to impeachment of their credibility, the referee must be supported in disregarding their testimony. (*Id.*)

3. The referee having found substantially that the allegations of the complaint were sustained by the evidence of the plaintiff's witnesses, and that the allegations of the answer were not sustained by the defendant's evidence—Judgment for plaintiff affirmed. (*Id.*)

4. In an action for alleged false and fraudulent representations in the purchase of a suit of clothes by the defendant of the plaintiff, upon a credit given upon the alleged statement by the defendant that he was a law-partner of one M.:

Held, that the production on the trial of M.'s law register (M. being dead) to, show that defendant was not a law-partner of M. at the time of the purchase, was of itself incompetent to prove the falsity of such alleged representation. (*Sullivan* agt. *Warren*, 284.)

5. Also parol evidence that M. kept a justice's court register and day book, which were not produced, wherein it did not appear that defendant was a law-partner of M. was also incompetent to prove the falsity of the alleged representations. (*Id.*)

6. Evidence by the deputy county clerk that during the time that defendant was alleged to be a law partner of M. that M. had pigeon holes in the clerk's office where his law papers were kept when filed, and that such papers did not show that defendant was a law-partner of M. was incompetent to prove such alleged false representations. (*Id.*)

7. Also that G. a lawyer, had, at the time, an office in the same block with M. and had more or less business with him; that defendant was in the office with M. but that the witness never did any business with them as partners, was insufficient to show that defendant was not a partner of M. (*Id.*)

8. Fraud of this description, is a crime, subjecting the party guilty of it to indictment and conviction for felony, and

the party who claims the advantage of it, to aid him in the collection of a debt, must see to it, that it is established by some clear and substantial evidence. (*Id.*)

9. In an action of slander, the plaintiff, as a witness on his own behalf, stated, on cross-examination, that he had had litigation with the defendant. He was then asked how many suits he had had with him, and for what causes of action?

Held, that the court below properly excluded so much of the inquiry as related to the causes of action. It was in no way material or pertinent to the issue. Its materiality consisted solely in its bearing upon the credit due to the plaintiff as a witness, and was therefore collateral in its nature. The end of such an inquiry would result to in an unlimited examination of the previous litigation, and in attempts indicate the different positions occupied by the parties engaged in it. (*Boynston* agt. *Boynston*, ante, 380.)

10. To the question, whether the plaintiff had not previously sued the defendant for slander and recovered only \$10:

Held, that this was included in that portion of the previous question which the court rejected as improper. That the remarks on that exception was equally applicable to the exception taken to the exclusion of this inquiry. (*Id.*)

11. Where on the trial there is a variance between the evidence and the complaint which the court is authorized to disregard, it will be disregarded unless the defendant proves that he has been misled to his prejudice. (*Id.*)

12. Where a contract, including a settlement of all accounts, is reduced to writing and signed by the parties, it merges all previous contracts, understandings, or expectations upon the subject. (*Lee* agt. *Decker*, ante, 479.)

13. And where the testimony of one of the parties to such contract is in accordance with the writing, it will prevail over the contradicting testimony of the other party. (*Id.*)

14. In an action where the defense is usury, evidence that plaintiff had loaned money at other times, prior to the transaction in question, at usurious rates of interest, is inadmissible. (*Boss* agt. *Ackermann*, 46 N. Y., 210.)

15. In an action for breach of covenants in a deed granting a water power, the reception of evidence of the compara-

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- tive value of the use of the mill as it was, and as it would be, with a given amount of power, without any evidence that such amount of power would have been obtained, if the stipulated amount of water had been furnished, is error. (*Torrence* agt. *Conger*, 46 N. Y., 340.)
16. In an action against a common carrier, a letter from plaintiff's agent, who made the contract for him, directed to and received by defendant, in which letter the agent stated the contract, as he claimed it to be, was offered and received in evidence.
- Held*, the evidence was competent and properly received. (*Sturgeon* agt. *Bisell*, 46 N. Y. 462.)
17. The declarations and admissions of a party to a record, of any fact material to the issue, are competent evidence against him, although they are inconsistent with and tend to contradict the testimony of other witnesses called by the adverse party. (*Williams* agt. *Sargeant*, 46 N. Y., 461.)
18. Plaintiff sought to recover as upon the rescission of a contract, for the purchase of an undivided share or interest in certain oil property in Pennsylvania. The assignment entitled plaintiff, to receive a proportionate number of shares of the stock of an incorporated association, when it was fully organized. Defendant offered to show that plaintiff received the stock in accordance with the contract, and had never returned it, or canceled it, or offered so to do. This evidence was excluded.
- Held*, error. That if the certificates of stock was received after knowledge of fraud, it was an election to abide by the contract, if before, plaintiff, upon a rescission was bound to transfer or tender it to defendants. (*Cobb* agt. *Hatfield*, 46 N. Y., 533.)
19. The dissolution of a copartnership may be proved by parol, and a certificate signed by one of the copartners to the effect, that he has purchased the interest of the other members of the firm, is competent evidence upon the question, whether such an agreement was in fact made, and as corroborative of the alleged parol contracts. (*Emerson* agt. *Parsons*, 46 N. Y., 560.)
20. The rule that a deed absolute upon its face, can in equity, be shown by parol or other extrinsic evidence, to have been intended as a mortgage, has been, upon the fullest consideration, deliberately established in this state, and will not be departed from. (*Horn* agt. *Keteltas*, 46 N. Y., 605.)
- See* **DEEDS.** (46 N. Y.)
FOREIGN JUDGMENT. (*Id.*)
HUSBAND AND WIFE. (*Id.*)
PARTNERSHIP. (*Id.*)
TRIAL. (*Id.*)
21. In an action against a railroad company for damages, defendant's counsel offered, in evidence, a newspaper account of the transaction, prepared from accounts received on the day and at the place of the accident. The author was examined as a witness, and testified he talked with plaintiff and others about it, and supposed he learned from them, but had no distinct recollection of what was said, and could not tell from whom, principally, he received his information.
- Held*, the article was properly excluded. (*Downe* agt. *The N. Y. C. & H. R. Co.*, 47 N. Y., 83.)
22. The defendant having given evidence of the statements and declarations of the plaintiff, in respect to the circumstances of the injury done, after the occurrence, the plaintiff was permitted to prove by another witness his own declarations relating to the same subject; but such a declaration did not appear to be a part of the conversation proved by the defendant. The admission of the independent declarations of the plaintiff, although made not far from the time of those already in evidence.
- Held*, to be erroneous. (*Id.*)
23. Evidence of negotiations with the officers of defendant for a settlement, held competent in explanation of delay in bringing the action. (*Id.*)
24. A recital in a conveyance is only evidence against the parties to it, and privies in blood, or in estate. It does not bind strangers or those claiming by title paramount, and as against them the conveyance, without other evidence of title, is no proof of title in one claiming under it. (*Hardenburgh* agt. *Lakin*, 47 N. Y., 100.)
25. In an action against a physician for malpractice and neglect:
- Held*, that the admission of proof that defendant had not presented any bill or asked any pay for his services, was error. (*Baird* agt. *Gullett*, 47 N. Y., 186.)
26. Where a contract as evidenced by the writings between the parties is not entirely intelligible, evidence of

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the situation and relation of the parties toward each other, and of the circumstances attending the negotiation, is competent as aids in the interpretation of the written instrument. (*Field* agt. *Munson*, 47 N. Y., 221.)

27. The simple proof of the fact that a conversation was had with a deceased person, without proof of the conversation itself, is not obnoxious to the objection that it is proof of a transaction or communication within the meaning of section 399 of the Code, unless it may be in a case where where the mere fact of a conversation is the material thing to be proved. (*Hier* agt. *Grant*, 47 N. Y., 267.)

28. Where a complaint alleges the death of an intestate, and the due and legal appointment of plaintiff as administrator of the estate, and the answer contains only a general denial, the letters of administration, in due form produced in evidence, are sufficient *prima facie* to establish plaintiff's representative capacity. (*Belden* agt. *Mesker*, 47 N. Y., 307.)

29. Evidence of the testimony of a deceased person, upon a former trial, is inadmissible where, if living, he would not be a competent witness, under section 399 of the Code. (*Eaton* agt. *Alger*, 47 N. Y., 345.)

30. Defendant, upon settlement of accounts with his father, was found indebted in the sum of \$426, for which he gave his note. In an action upon the note brought by the personal representatives of the father after his decease, defendant upon the trial produced the note canceled; he testified that it had not been paid or satisfied; it appeared he had means of access to his father's papers.

Held, that under the facts in the case, possession of the note was not evidence of its discharge. The law does not presume a gift. (*Grey* agt. *Grey*, 47 N. Y., 552.)

31. Where the language employed in a policy to specify the purposes for which the building insured may be used is ambiguous, knowledge by the company of the purpose for which it is used, is a circumstance proper to be considered in determining the intent. (*Reynolds* agt. *Commerce Fire Ins. Co.*, 47 N. Y., 597.)

32. Under the provisions of section 17, 1 R. S. p. 759, a record of a conveyance duly recorded, or a transcript

thereof duly certified, is made original and primary evidence, and may be introduced in evidence with the same effect as the original, and without proof of the loss or destruction of the latter. (*Olark* agt. *Olark*, 47 N. Y., 664.)

See FALSE PRETENCES. (47 N. Y.)

FRAUD. (*Id.*)

INSURANCE, ACCIDENT. (*Id.*)

INSURANCE, LIFE. (*Id.*)

PLEADINGS. (*Id.*)

PRACTICE. (*Id.*)

TAX SALES. (*Id.*)

TRIAL. (*Id.*)

VENDOR AND VENDEE. (*Id.*)

33. Evidence of a conversation between the parties at the time the defendants delivered to the plaintiff a writing claimed to be a contract, was objected to, on the ground that what was said, at the time, was merged in the written contract:

Held, that as the plaintiff was proceeding on the theory that the writing was not the agreement, and that the conversation proved it was not, the evidence was admissible for that purpose. (*Hogg* agt. *Owen*, 60 Barb., 34.)

34. In an action against husband and wife, brought by judgment creditors of the husband, to set aside conveyances made by the defendants, as fraudulent, the examination of the husband, taken in supplementary proceedings against him, instituted by another creditor, is legitimate evidence, so far as it affects the husband. (*Lornmore* agt. *Campbell*, 60 Barb., 62.)

35. In an action against husband and wife, brought by judgment creditors of the husband, to charge the separate estate of the wife with the judgment debt, the books of account of one B., (since deceased,) containing an account consisting of the debt and credit, between B. and the husband, were offered for the purpose of proving that the latter had paid B. for materials which B. had furnished for a house the wife had built upon her land:

Held, that the books were clearly incompetent evidence as against the wife; the account therein contained being between other parties. (*Isaam* agt. *Schaefer*, 60 Barb., 317.)

36. In a cause where it can be claimed that there is a doubt as to what a word, letter or figure, contained in an instrument, was intended to be, extrinsic evidence is admissible upon the question, and does not infringe upon the general rule that parol evidence is not admissible to change or explain a

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written instrument; the object of the inquiry being to ascertain what the language of the instrument in fact is, and not to give it a construction. (*Arthur agt. Roberts*, 60 Barb., 580.)

See ANSWER. (60 Barb.)

ASSAULT AND BATTERY. (*Id.*)

SEDUCTION. (*Id.*)

VENDOR AND PURCHASER. (*Id.*)

WILL. (*Id.*)

37. A statement contained in a bill for towing, receipted by the tower, and delivered in advance to the owner of the vessel towed, that the towing is "at the risk of the owner or master of the vessel towed," is a contract in writing within the rule, which excludes unwritten evidence to add to, vary, explain or contradict it. (*Milton agt. Hudson River Steamboat Co.*, 4 Lansing, 76.)

38. When an officer, or party, is in the attitude of asserting rights, founded on official acts, the due performance of which is essential to the right, such performance will not be presumed. (*Wood agt. Terry*, 4 Lansing, 80.)

39. But one who asserts a right, based on the illegality, or irregularity of the proceedings of a court or officer, assumes the onus of showing the alleged defects. (*Id.*)

40. On the trial of a prisoner charged, as principal in the second degree, with aiding and abetting in the murder of one of several who were seeking to obtain entrance at night into the dwelling of one U. (the principal in the first degree), where the prisoner was lawfully entitled to aid in protecting the premises, the theory of the defense being justification:

Held, that he was entitled to the benefit of his own testimony to the effect that he had heard that persons had been at the house a short time previous to the killing, and taken U. out in the night and done him violence, as tending, in connection with other testimony of a similar purport, to show the intent with which he had aided and abetted in the killing. (*Temple agt. The People*, 4 Lansing, 119.)

41. Where the event of an action between adjoining owners of land depended upon the location of their boundary line, and the plaintiff proved declarations in his favor respecting the line, made by the defendant's grantors, while owning and in possession of the undisputed premises of the defendant, and the defendant was allowed to prove declarations to the contrary, of

the same parties, during the same time, it seems the latter declarations were admissible, as tending to contradict the plaintiff's evidence. (*Smith agt. McNamara*, Lansing, 169.)

42. And *held*, that the declarations in favor of the defendant were competent evidence to show the extent of the possession claimed by his grantors; and that this was so, although they might not, at the time of the declaration, have been in actual occupation of the disputed territory, or upon or in view of the disputed line. (*Id.*)

43. Upon a question whether representations as to the value of stock were fraudulently made with the design to, and did, induce a purchase of some of it, statements concerning the value of the stock and solicitations to purchase, made by the alleged fraudulent vendor to third parties, not in presence of the vendee, at different times and places remote from the place of representations in question, none of them contemporaneously with, and some subsequently to them, are not admissible evidence. Nor are such statements and solicitations admissible to show that the party making them colluded with the vendor in fact, to procure a sale by the latter for their joint benefit. Nor is a sale, by the party making the representations, of the stock, prior to the alleged fraudulent sale, evidence upon either of these questions. (*Hubbell agt. Alden*, 4 Lansing, 214.)

44. Where the defendant's intent to defraud is an issue in the action, his own testimony as to the absence of such intent is admissible on his own behalf, and also on behalf of co-defendants alleged to have been acting in concert with him in the fraud; and where defendant's evidence in such an action on that question was excluded by the referee, upon objection that the case was closed, the case being important and the question vital, where the trial had extended over numerous hearings with a liberal course of examination in matters relating to practice, and the previous examination of the witnesses had not related to such intent, and the examination could not have been understood to be definitely closed:

Held, that the exclusion was error. (*Id.*)

45. A judgment roll, which states a verdict for the defendant, and judgment thereon for him, is conclusive as to how the fact was, although it is shown that at the same term at which the trial is stated to have occurred, an order nonsuing the plaintiff and giving the defendant judgment thereon, was

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entered in the action. (*Press agt. Ireland, 4 Lansing, 278.*)

46. On a question of title to land, a former judgment may be used as an estoppel, although no land whatever be described in the record, on its being shown by parol that the title to the same land involved in the existing controversy was material, and in fact investigated and determined, in the former action. (*Id.*)

47. A constable's oral evidence of the service of the summons is admissible before a justice, as a basis for "proceedings to recover possession of land" (2 R. S., 514, § 32); and this is so, although he may have made a written return by affidavit. (*Robinson agt. McManus, 4 Lansing, 380.*)

48. In an action to recover damages for forcible entry upon the premises to which the defendant proves that he had the legal title at the time of the entry, under a deed from one who had contracted to sell the premises to the plaintiff, made in pursuance of an assignment of the contract and interest in the land by the plaintiff to him (defendant), the plaintiff, to defeat the justification, may show that the assignment, though absolute in form, was, in fact, made under a previous oral understanding between the plaintiff and defendant, that the latter should take the assignment of the contract and a deed under it, and hold for the benefit of the former upon the terms specified in the contract. (*Id.*)

49. The testimony of a son as to representations made to him by his parents, is inadmissible to show the place of his birth. (*McCarty agt. Deming, 4 Lansing, 440.*)

50. Upon the trial of a question as to the proper allowance for all money, evidence of an offer on behalf of an unnamed person, with tender of a contract, in blank, agreeing to purchase real property at a price, and upon terms, at which the defendant (the owner from whom the alimony is due), in his testimony has said he would sell, does not show the value of the property to be equal to the amount offered, in opposition to competent testimony to the contrary. (*Gallinger agt. Gallinger, 4 Lansing, 473.*)

See BRIDGES. (*4 Lansing.*)

CHATTEL MORTGAGE. (*Id.*)

COMMON CARRIER. (*Id.*)

CONTRACT. (*Id.*)

DONATIO CAUSA MORTIS. (*Id.*)

EXECUTORS AND ADMINISTRATORS. (*Id.*)

FORECLOSURE. (*Id.*)

HIGHWAYS AND STREETS. (*Id.*)

JUDGMENTS. (*Id.*)

PENALTY. (*Id.*)

PRACTICE. (*Id.*)

RAILROAD MUNICIPAL BONDS. (*Id.*)

REVENUE STAMPS. (*Id.*)

EXCEPTIONS.

See APPEAL. (*47 N. Y.*)

TRIAL. (*Id.*)

CRIMINAL LAW. (*60 Barb.*)

PRACTICE. (*4 Lansing.*)

EXCUSE.

1. It is no excuse for the non-service of copies of the case, as required by rule 7 of this court, that appellant has not caused the return to be made and filed, as required by rule 2. (*Sage agt. Volkening, 46 N. Y., 448.*)

EXECUTION.

1. A constable need not consult a judgment debtor as to what part of his property is exempt from execution before a levy thereon; but he is justified in taking and selling the debtor's property, though exempt, if not informed of the exemption, and, it seems, unless the exemption is claimed within a reasonable time after notice of the levy. (*Twiman agt. Swart, 4 Lansing, 263.*)

2. The purchaser of property exempt from execution, at an execution sale, is not liable in an action for its recovery, brought without demand by the owner, who, being present, failed to claim the exemption, but forbade the sale upon grounds having no foundation in fact. (*Id.*)

3. Payment of costs and alimony ordered to be paid in a final judgment, dissolving the marriage contract, in a wife's suit for divorce, may be enforced by execution. (*Lanning agt. Lanning, 4 Lansing, 377.*)

4. Proceedings as for contempt for neglect to make the payment as decreed, are not authorized in such case by section 285, of the Code. (*Id.*)

See FORECLOSURE. (*4 Lansing.*)

ORDER OF COURT. (*Id.*)

EXECUTORS AND ADMINISTRATORS.

17. Where the decision of the court, filed in the action, directs judgment in favor of the defendants against the plaintiff, who sues as administrator, it allows

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- the costs to be taxed, and charged upon, and collected out of the estate represented by the administrator; and, in the absence of a special order made for mismanagement, they cannot be collected out of the administrator personally. (*Landslay agt. Deafendorf ante*, 90.)
2. Where the plaintiff allowed sixteen months to elapse after his summons and complaint were served upon one of the defendants before he caused the same to be served on the other defendant, thus rendering it necessary that two answers should be prepared, though they contained substantially the same defenses; for that reason, each defendant allowed the costs before notice of trial, and disbursements prior to issue being joined by service of the answer of the defendant last served. (*Id.*)
3. A contract made by executors in form as such, in consideration of services to be rendered in vindicating and asserting their claims to property in their representative capacity, and for the benefit of the estate they represent, does not bind the estate or create a charge upon the assets in the hands of the executors. (*Austin agt. Munro*, 47 N. Y., 380.)
4. In an action brought against defendants as executors, and where the form of the complaint, the substantial averments therein, and the relief demanded, characterize the action as against defendants in their representative capacity, upon demurrer the action cannot be converted into one against defendants individually. (*Id.*)
- See COSTS.* (47 N. Y.)
- LIMITATIONS OF ACTIONS. (*Id.*)
5. In every case, when a complaint is made to a surrogate, under the provisions of the Revised Statutes, that the circumstances of a person appointed executor are so "precarious" as not to afford adequate security for his due administration of the estate, (2 E. S., 72, § 18,) it must depend upon its own peculiar features and circumstances; of which the surrogate is the appropriate judge. (*Shields agt. Shields*, 60 Barb., 56.)
- See ACCOUNT.* (60 Barb.)
6. A special administrator has no authority to make investments. (*Baskin agt. Baskin*, 4 Lansing, 40.)
7. It is his duty to deposit the funds of the estate with a solvent bank, or other institution which receives deposits, subject to demand, and he may receive interest thereon from the depository. (*Id.*)
8. Executors, who receive as assets from special administrator, certificates of deposit of moneys of the estate with an unauthorized depository, made payable to such administrator, individually, upon time, assume the risks of the latter to the estate in respect thereof, and are liable, as he would be, for loss happening from the failure of the depository. (*Id.*)
9. The surrogate has no power to compel an executor to account for property received by his testator, as executor, unless it has come into the last executor's possession. (*Montross agt. Wheeler*, 4 Lansing, 99.)
10. The authority of an administrator, appointed in this state, upon the goods, &c., of a deceased nonresident, to receive and satisfy the debts due here, is exclusive of that of any foreign executor or administrator. (*Stone agt. Scripture*, 4 Lansing, 186.)
- See DONATIO CAUSA MORTIS.* (4 Lansing.)
- EQUITABLE CONVERSION. (*Id.*)
- PRACTOR. (*Id.*)
- EXEMPTION FROM EXECUTION.
- See EXECUTION.* (4 Lansing.)
- FORECLOSURE. (*Id.*)
- EXEMPTION FROM JURY SERVICE.
- See JUROR.* (4 Lansing.)
- EXPRESS COMPANIES.
- See CONSIGNOR AND CONSIGNEE.* (60 Barb.)
- EXTINGUISHMENT.
- See DOWER.* (4 Lansing.)
- F.
- FALSE AND FRAUDULENT REPRESENTATIONS.
1. In an action for alleged false and fraudulent representations in the purchase of a suit of clothes by the defendant of the plaintiff, upon a credit given upon the alleged statement by the defendant that he was a law-partner of one M.:

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Held, that the production on the trial of M.'s law register (M. being dead) to, show that defendant was not a law-partner of M. at the time of the purchase, was of itself incompetent to prove the falsity of such alleged representation. (*Sullivan* agt. *Warren*, 184.)

2. Also parol evidence that M. kept a justice's court register and day book, which were not produced, wherein it did not appear that defendant was a law-partner of M. was also incompetent to prove the falsity of the alleged representations. *Id.*

3. Evidence by the deputy county clerk that during the time that defendant was alleged to be a law partner of M. that M. had pigeon holes in the clerk's office where his law papers were kept when filed, and that such papers did not show that defendant was a law-partner of M. was incompetent to prove such alleged false representations. (*Id.*)

4. Also that G. a lawyer, had, at the time, an office in the same block with M. and had more or less business with him; that defendant was in the office with M. but that the witness never did any business with them as partners, was insufficient to show that defendant was not a partner of M. (*Id.*)

5. Fraud of this description, is a crime, subjecting the party guilty of it to indictment and conviction for felony, and the party who claims the advantage of it, to aid him in the collection of a debt, must see to it, that it is established by some clear and substantial evidence. (*Id.*)

See EVIDENCE. (4 *Lansing*.)
PRACTICE. (*Id.*)

FALSE IMPRISONMENT.

See ARREST. (4 *Lansing*.)
BASTARDY PROCEEDINGS. (*Id.*)

FALSE PRETENCES.

1. The design of the statute against obtaining money, etc., under false pretences, is to protect those, who for an honest purpose, are induced by false and fraudulent representations to give credit or part with their property, and not to protect those, who do this for unworthy or illegal purposes. When, therefore, the indictment charged that the prisoner falsely or fraudulently represented he had a warrant against M., and thereby induced him to deliver

up to prisoner a watch and diamond ring:

Held, that the property must have been parted with as an inducement to a supposed officer to violate the laws and his duties, and the indictment could not be sustained. (*PECKHAM, J.*, dissenting.) (*McCord* agt. *People*, 46 N. Y., 471.)

2. An indictment for obtaining goods by false pretences charged, that plaintiff in error, with intent feloniously to cheat and defraud, represented that a bank check delivered by him in payment of goods purchased, purporting to have been drawn by one Peter Smith upon the Ocean Bank of New York, for the sum of \$140, was a good and genuine check: that he (plaintiff in error) had money on deposit in said bank and it would be paid on presentation.

Held, sufficient. (*P. W. Smith* agt. *The People*, 47 N. Y., 303.)

3. The production of the books of the bank having been waived by counsel for prisoner on the trial,

Held, that the testimony of the book-keeper of the bank, that the name of the prisoner did not appear upon the books, and there was no credit to that name, was competent and sufficient to show, if true, that there was no funds in the bank to pay the check, and that it was worthless. (*Id.*)

4. The counsel for prisoner requested the court to charge, that the pretence must appear upon the indictment to be such as could not be guarded against by an exercise of common sagacity and prudence.

Held, that the refusal so to charge was not error, as the sufficiency of the indictment was a question of law to be determined by the court, with which the jury had nothing to do. (*Id.*)

FALSE STAMPS OR TRADE MARKS.

1. Under the provisions of section 4, of chapter 306, Laws of 1862, entitled "An act to prevent and punish the use of false stamps, labels, or trade marks," as amended by section 2, of chapter 209, Laws of 1863, to render a person liable to the penalty therein prescribed, the act complained of must have been done with intent to defraud some person or persons, or some body corporate. (*Low* agt. *Hall*, 47 N. Y., 104.)

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FAST DRIVING.

See NEGLIGENCE. (60 Barb.)

FEDERAL COURTS.

1. It seems that by the act of congress of March 3d, 1851, (9 U. S., Statutes at Large, 635, 636,) the common law remedy for damages against the owner of a vessel not used in river or in inland navigation, happening without his privity or knowledge, is converted into a proceeding *in rem*, and that in such cases the jurisdiction of the federal courts is exclusive, under section 9 of the judiciary act of congress of 1789. (*Baird* agt. *Daly*, 4 *Lawson*, 426.)
2. It seems that vessels navigating the St. Lawrence River are not within the meaning of the act used "in rivers or inland navigation." (*Id.*)

FENCES.

1. The general rule that where a party is the owner of personal property which is upon the land of another, the former cannot commit a trespass by entering and taking it away, does not apply to that entry of a party which is necessary to enable him to make a partition fence between him and an adjoining owner. (*Carpenter* agt. *Halsey*, 60 Barb., 45.)

FIDUCIARY CAPACITY.

See ARREST. (4 *Lawson*.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. The right of a party in a case tried by a referee, to have separate findings of fact and conclusions of law, is a substantial one. (*Van Slyke* agt. *Hyatt*, 46 N. Y., 259.)
2. The findings of a referee are to receive the most favorable construction of which they are capable, for the purpose of upholding the judgment. (*Hill* agt. *Grant*, 46 N. Y., 496.)
3. Where, in an action tried by a referee, the case does not contain any of the evidence, but simply the referee's findings of fact and conclusions of law, the presumption is that there was no evidence from which any other facts could be found, and where the conclusions of law are excepted to, the question is, whether such conclusions are warranted by the facts found. (*Stoddard* agt. *Whiting*, 46 N. Y., 637.)

4. A party must be held to have believed each witness called by him creditable, and to have so presented him to the court. A referee has a right to find a witness mistaken; and if there is a contradiction between him and another, to decide the question of fact contrary to his statement. But he cannot judicially deem an uncontradicted witness, testifying against the party calling him, false and perjured, and so holding to infer the truth of the matter to be the reverse of what was testified. (*Fordham* agt. *Smith*, 46 N. Y., 683.)

5. The continuance in possession of a grantor of real estate after the conveyance, while it may be a circumstance proper to be considered in connection with other evidence tending to show a design to defraud creditors, does not of itself, warrant a finding of a legal conclusion, that the deed was fraudulent. (*Clute* agt. *Newkirk*, 46 N. Y., 684.)

See APPEAL. (46 N. Y.)
HUSBAND AND WIFE. (*Id.*)
SUBMISSION OF CONTROVERSY. (*Id.*)
EJECTMENT. (4 *Lawson*.)
PRACTICE. (*Id.*)

FORECLOSURE.

See SURPLUS MONIES. (46 N. Y.)

1. In an action brought by the assignee of a mortgage to foreclose the same, the mortgagor has the right to set up and prove a mistake in the drawing of the instrument, and have the same reformed. (*Andrews* agt. *Gillespie*, 47 N. Y., 487.)
2. When the mistake is in the terms of payment, delay in moving to correct the mistake, and payment by the mortgagor, of an installment, or a promise to pay as specified in the mortgage, under protest asserting the mistake, furnish no ground for a denial of the relief to which he is entitled nor will the absence of the assignee as a party bar him from such relief. (*Id.*)
3. The assignor is not a necessary party to the action, as upon the coming in of the answer, and notice thereby of defendant's claim, plaintiff may give notice of such claim to the assignor, and offer to him the future management of the suit, which would make the judgment binding upon him in respect to the fact of the mistake. (*Id.*)
4. A mortgagee who, upon foreclosure of his mortgage by advertisement and sale under the statute, receives only

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the amount due and expenses from the purchaser of the mortgaged premises, is not liable as trustee, to honor subsequent to his mortgage, for the surplus. (*Russell* agt. *Duflon*, 4 *Lansing*, 399.)

4. A mortgagee who has received a surplus from the purchaser, upon a statute foreclosure sale of a prior mortgage, is liable to a subsequent judgment creditor for the balance of surplus, after deducting the amount of the second mortgage; but interest on such balance runs only from the time of notice or demand of the claim. (*Id.*)

6. The statute (laws, 1838, chapter 597, § 5) which declares that plats of ground in Greenwood cemetery, when conveyed to individuals, shall not be liable to sale on execution, or to be applied to payment of debts by assignment under insolvent laws, is intended to prevent sale for payment of the owner's debts, against his will, by process of law, &c. A foreclosure sale, under a mortgage executed by the owner of a plat of ground, is not within the meaning of the act. (*Lantz* agt. *Buckingham*, 4 *Lansing*, 484.)

7. Accordingly, where the defendant conveyed a plat of ground in the cemetery to the plaintiff, with a privilege of interment therein, and the plaintiff executed to the defendant an instrument reciting the conveyance, and agreeing to reconvey on repayment of the consideration, with interest, in one year, and on default the plaintiff brought an action for sale of the property:

Held, that a sale under judgment of foreclosure was not prohibited by the act; and, if otherwise, the plaintiff was at least entitled to a strict foreclosure, and his complaint was not demurrable for not stating a cause of action. (*Id.*)

8. Affidavits of proceedings on statute foreclosure and sale, are evidence of the title purchased at such foreclosure sale, although unrecorded. The *dictum* in *Tuthill* agt. *Tracy*, (31 *N. Y.*, 157.) to the contrary, disapproved. *Howard* agt. *Haich*, (29 *Barb.*, 297.) upon this point, reaffirmed. (*Frost* agt. *Thompson*, 4 *Lansing*, 489.)

See CHATTEL MORTGAGE. (4 *Lansing*.)
POWER. (*Id.*)
EXECUTORS AND ADMINISTRATORS. (*Id.*)
LOAN COMMISSIONERS. (*Id.*)
REVENUE STAMPS. (*Id.*)
USURY. (*Id.*)

FORECLOSURE SUIT.

1. According to the settled rule of equity, a mortgagee cannot, in an action to foreclose his mortgage, call in as parties, persons claiming in hostility to the title of the mortgagor, and have the legal title adjudged in the equitable action. The question of legal title is a question of law, and to be determined in an action of ejectment at law. (*Brandage* agt. *The Domestic and Foreign Missionary Society*, 60 *Barb.*, 204.)

2. The plaintiff, on being applied to by W. to purchase a bond and mortgage given to W. by the defendant, declined purchasing, but agreed to take the same to sell, as a broker for the mortgagees, for a compensation agreed upon. The securities were thereupon assigned to him, by W., to enable him to negotiate and transfer a title to a purchaser, and for no other purpose, except that out of the avails of the sale he should retain enough to pay and satisfy a judgment he held against W., and release a levy. But after having obtained the assignment, he refused to sell and assign the bond and mortgage, but claimed to retain the same as his own property, without paying W. anything, and refused even to satisfy the judgment, or to release the levy:

Held, 1st. That the plaintiff had obtained no title to the securities which he could enforce against the mortgagor; and that in an action of foreclosure brought by him, the mortgagor could set up as a defense that he had paid the mortgage debt to the mortgagee, and taken a discharge from him.

2d. That the plaintiff had acquired no right to, or equity in, the bond and mortgage, even to the extent of his judgment, which must be deemed to be satisfied by the levy, while the levy remained. (*Hall* agt. *Edwin*, 60 *Barb.*, 240.)

See INFANTS. (60 *Barb.*)
PRACTICE. (*Id.*)

FOREIGN CORPORATIONS.

See WILLS. (46 *N. Y.*)
CREDITORS' SUIT. (60 *Barb.*)
CORPORATION. (4 *Lansing*.)

FOREIGN COURT.

See DIVORCE. (4 *Lansing*.)

FOREIGN EXECUTORS AND ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS. (4 *Lansing*.)

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FOREIGN JUDGMENT.

1. A decree of divorce obtained in another state, the defendant not being served with process, and both parties at the commencement of the suit and during its pendency being residents of this state, is invalid. An attempt by defendant in such suit, made in a court in the state where decree was granted, to set it aside, which was defeated upon technical grounds solely, does not affect the question. The record of such decree is not conclusive as to jurisdiction, but the facts therein stated giving the court jurisdiction may be disputed. This rule is not in conflict with sec. 1, art. 4, of Constitution of the United States. (*Hoffman* agt. *Hoffman*, 46 N. Y., 30.)

FORFEITURE.

See LANDLORD AND TENANT. (60 Barb.)

FORFEITURE OF CHARTER.

See ACTION. (4 Lansing.)

FORGED SIGNATURE.

See BILLS OF EXCHANGE. (46 N. Y.)

FORMER ACTION.

See EVIDENCE. (4 Lansing.)

FORMER ADJUDICATION.

1. Defendant took the horse of plaintiff to board, with instructions not to use him; he did use him and the horse was foundered. Plaintiff abandoned the horse and brought suit for conversion. Defendant brought suit in justice's court for the board of the horse; in that action the plaintiff herein in his answer set up the conversion. This was demurred to, and the justice sustained the demurrer, holding that it was no defense, and a recovery was had for the amount of the claim. Defendant, by supplementary answer, pleaded this former adjudication in bar.

Held, that the remedy for the erroneous decision of the justice, should be sought in that suit; that the recovery therein necessarily adjudged a performance of the contract by the defendant, and that there was no conversion. The judgment, therefore, was a bar. (*Collins* agt. *Bennett*, 46 N. Y., 490.)

FRAUD.

1. One M. held a judgment against plaintiff for over \$2,000. He proposed to plaintiff to discharge it for \$500. This offer was not accepted. R., a stranger to plaintiff, by falsely representing that he was a friend of, and came from plaintiff, induced M. to assign the judgment to him for \$500:

Held, that the only one injured by, or who could complain of the fraud, was M., and that plaintiff was not entitled to the benefit of the purchase. (*Rafallo* and *Prockham* JJ., dissenting.) (*Garvey* agt. *Jervis*, 46 N. Y. 310.)

See HUSBAND AND WIFE. (46 N. Y.)
SUBMISSION OF CONTROVERSY.
(*Id.*)

2. Plaintiff makes advances upon stolen coupon bonds of the M. and St. P. R. R. Co., which originally were accompanied by, or had attached to them, certificates, stating in substance that, upon the surrender of the certificate and bond, the holder was entitled to full paid preferred stock. These certificates were referred to in the body of the bond. When the bonds were transferred to plaintiff the certificates were not with them.

Held, that while the absence of the certificates might be a circumstance of some weight in determining the question, yet, of itself, it did not prove fraud or bad faith. (*Welch* agt. *Sage*, 47 N. Y., 143.)

3. Defendants represented a voluntary association which owned a cheese factory; this they leased to C. He contracted to manufacture cheese for them at a specified sum per hundred pounds. No right of supervision was reserved. Defendants carried on the business by furnishing the materials, taking the products and selling them in the market, as an article manufactured by them.

Held, that as to the public they assumed the character of principals, and adopted the responsibility of the manufacture, and were liable for the frauds of C., or his subordinates, in the manufacture of cheese. (*Durst* agt. *Burton*, 47 N. Y., 167.)

4. In an action of fraud in the sale of the cheese, which, by the terms of the contract, was purchased to be forwarded and sold in New York, after plaintiff had proven its value in the New York market, defendants offered to prove that the cheese was shipped and sold by plaintiff in the London

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market at a certain price, and that the cheese market in New York is regulated and controlled mainly by the price of cheese in London and Liverpool.

Held, that the market price in New York was within the contemplation of the parties, and was properly proven; and that the value at another place and another time was not material, when there was clear and explicit proof of its value in the market designated; and, that, therefore, the proof offered was properly excluded. This class of evidence is, to some extent, within the discretion of the court. (*Id.*)

5. A party defrauded in a contract is not barred from his right of action for the fraud, by the fact of his having compromised the claim against him upon the contract, unless it appears that he had, at the time of such compromise, knowledge of the facts, constituting the fraud. A bare suspicion, not founded upon facts, or upon any investigation, is not sufficient. (*Baker* agt. *Spencer*, 47 N. Y., 562.)

See HUSBAND AND WIFE. (47 N. Y.)
MANUFACTURING CORPORATIONS.
(*Id.*)

6. Fraud avoids all contracts, and transfers of title, into which it enters, at the election of the party defendant. (*Hall* agt. *Edwin*, 60 Barb., 349.)

See AGREEMENT. (60 Barb.)
FORECLOSURE SUIT. (*Id.*)
MAXIMS. (*Id.*)
VENDOR AND PURCHASER. (*Id.*)
EVIDENCE. (4 Lansing.)
PRACTICE. (*Id.*)

FRAUDULENT CONVEYANCES.

See FINDINGS OF FACT AND CONCLUSIONS OF LAW. (46 N. Y.)
HUSBAND AND WIFE. (*Id.*)
HUSBAND AND WIFE. (47 N. Y.)
LIMITATION OF ACTIONS. (*Id.*)
TRUSTS. (*Id.*)

1. A finding of fact, by a referee, that conveyances were made with intent to hinder, delay and defraud the future creditors of the grantor, when the whole case shows that there were then no creditors to be defrauded, is, in law, simply absurd, or rather, a legal impossibility. (*Larmore* agt. *Campbell*, 60 Barb., 62.)

See HUSBAND AND WIFE. (60 Barb.)

FRAUDS, STATUTE OF.

See AGREEMENT. (60 Barb.)

G.

GENERAL ISSUE.

1. Want of consideration could always be shown, under the general issue. Anything which tended to show that a party to an instrument never had a cause of action against the other party to it, was always competent under a general denial of the cause of action alleged, and is so still. (*Evans* agt. *Williams*, 60 Barb., 346.)
2. But this rule does not apply to the holder of negotiable paper, who takes it in good faith before it becomes due, in the usual course of trade. (*Id.*)

GENERAL RAILROAD ACT.

See RAILROAD COMPANY. (4 Lansing.)

GENERAL TERM.

See APPEAL. (46 N. Y.)
APPEAL. (47 N. Y.)
NEW TRIAL. (*Id.*)
APPEAL. (4 Lansing.)

GIFT.

1. It is essential to the parol gift of personal property, in order to pass the title, that it be delivered. A mere intention, or naked promise to give, without some act to pass the property, is not a gift. The donor must not only part with the possession, but with the dominion of the property. And the gift is onely perfect and irrevocable by delivery and acceptance. (*Brink* agt. *Gould*, ante. 289.)
2. In this case, there was no such delivery of the property (a heifer) to the plaintiff by her mother, as the law requires to establish a lawful gift. (*Id.*)
3. A debt cannot be transformed into a gift by a mere parol declaration subsequent to its creation; but where money is delivered by a father to a son, under circumstances rendering it uncertain as to whether it was intended as a loan or gift, a distinct declaration made afterwards by the father to the son, may have the effect of determining which it was. (*Doty* agt. *Wilson*, 47 N. Y., 580.)
4. A promise made by a donee to pay a sum of money, or do any act, not constituting a condition of delivery of title, does not invalidate the gift. (*Id.*)

See EVIDENCE. (47 N. Y.)

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GIFT IN PROSPECT OF DEATH.

See DONATIO CAUSA MORTIS. (4 *Lansing*.)

GOLD COIN.

See JUDGMENT. (46 *N. Y.*)

GOOD-WILL.

See PARTNERSHIP. (60 *Barb.*)

GRANTOR AND GRANTEE.

1. The grantor of land may claim to hold adversely against his grantee. (*Cramer* agt. *Benton*, 4 *Lansing*, 291.)

See DEFENSES. (4 *Lansing*.)

DOWER. (*Id.*)

EASEMENT. (*Id.*)

MISTAKE OF LAW AND FACT (*Id.*)

TRUSTS AND TRUSTEES. (*Id.*)

GREENWOOD CEMETERY.

See FORECLOSURE. (4 *Lansing*.)

GUARANTY.

1. Defendant guaranteed, that B. & S. should receive and pay for a steam engine and two boilers, of a given capacity and power, particularly described, at an agreed price. By an agreement of the principals, without the assent of the surety, an engine with three boilers, and of a greater capacity and power, at an additional price, was substituted:

Held, that the change in the contract was a material one, imposing entirely new obligations upon the contracting parties, and discharged the surety from any liability. (*Grant* agt. *Smith*, 46 *N. Y.*, 93.)

GUARDIAN AD LITEM.

See PARTITION. (60 *Barb.*)

GUARDIAN AND WARD.

1. Where an infant plaintiff procured the appointment of a guardian, and the suit proceeded to issue and was on the calendar for trial. On a motion by the defendant to dismiss the complaint and action, on the ground that the guardian was, at the time of his appointment, and still is an infant.

Held, that the defendant, not knowing of the infancy of the guardian until after service of his answer, the irregularity in the appointment of guardian was not

waived by him in answering upon the merits. (*Welford* agt. *Oakley*, ante, 118.)

Held also, that the plaintiff, having shown satisfactorily that the guardian acted under a misapprehension as to his having attained his majority and having lately ascertained his mistake, was allowed upon terms to appoint a new and proper guardian to proceed in the action *nunc pro tunc*. (*Id.*)

4. A guardian in socage may lease the lands of his ward for a term as long as he continues guardian, or for any number of years within the minority of the ward. The lease, however, is subject to its being defeated by the appointment of another guardian, pursuant to the statute, and his election to avoid it. (*Emerson* agt. *Spicer*, 46 *N. Y.*, 594.)

See SUBMISSION OF CONTROVERSY. (4 *Lansing*.)

H.

HABEAS CORPUS.

See CRIMINAL LAW. (60 *Barb.*)

HIGHWAY.

4. The owner of land over which a street or highway passes, has a right to excavate the soil under the surface, and to use the space, so long as he does not interfere with the public right of way. (*McCarty* agt. *City of Syracuse*, 46 *N. Y.*, 194.)

2. Where the owner of land in a village lays out streets through the same, divides the residue into village lots, causes a map of the same to be recorded in the county clerk's office, and conveys the lots bounded on such streets, if the same are not accepted by the proper authorities, or worked and used as public highways, they do not become such. (*Wohler* agt. *The B. and L. S. R. R. Co.*, 46 *N. Y.*, 686.)

See CONSTITUTIONAL LAW. (46 *N. Y.*)

3. Highway commissioners are not authorized to make any order for the removal of encroachments, except in the case of a highway laid out according to the statute. (*Christy* agt. *Newton*, 60 *Barb.*, 332.)

4. Where an order, purporting to be made by commissioners of highways, was signed by two of them only, and it did not appear from it that the other commissioner was notified to attend, or

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had any knowledge of the proceeding; nor was there anything to show that any preliminary steps, such as the statute requires, had been taken:

Held, that the order was a nullity. (*Id.*)

5. A highway, opened and worked for a short part of the distance, only, and not opened or worked, as described in the survey, or in any manner, on a particular portion thereof, until after the lapse of nearly fourteen years, from the time of its being laid out, ceases to be a highway for any purpose, at the place where it is not opened or worked. (*Id.*)

6. In an action for wrongfully diverting a water-course on the plaintiff's land, where the defendant justifies as overseer of highways, it is erroneous for the judge to instruct the jury that such diversion was unlawful, and that the plaintiff is entitled to recover the damages he has sustained by reason thereof; it being an instruction to the jury that the plaintiff is entitled to recover, and not a mere intimation of an opinion on a question of fact. (*Moran* agt. *McClarns*, 60 Barb., 383.)

7. It is also error for the court to instruct the jury that if they should come to the conclusion that the defendant acted maliciously in diverting the water, to injure the plaintiff, then the latter is entitled to recover all the damages he has sustained; whether the defendant had a right to turn the water or not; this amounting to an instruction to the jury that notwithstanding a public officer may be fully warranted and duly authorized, in law, to do the act complained of, yet his motives are the subject of inquiry by the jury, and that if they come to the conclusion that his motives were selfish and sinister, then the act becomes unlawful. (*Id.*)

See CONSTITUTIONAL LAW. (60 Barb.)
LOCKPORT (CITY OF.) (*Id.*)
MUNICIPAL CORPORATIONS. (*Id.*)

8. The trustees of the village of Lancaster have authority, under its charter, to impose penalties for the destruction of shade trees on the village streets, but not for any act for which a penalty is imposed by law. (See laws 1859, chap. 320, sec. 47, subd. 25, sec. 48, subd. 12.) It seems they may exercise the authority, although the destruction of ornamental trees, &c., is made a misdemeanor by statute (laws 1853, chap. 573), and punishable by fine or imprisonment, or both, and liability to the party injured for five times the amount of his damages. (*Village of*

Lancaster agt. *Richardson*, 4 Lansing 136.)

9. It seems that shade trees are ornamental trees, within the statute. (Laws 1853, chap. 573.) (*Id.*)

10. Trees standing on streets and highways, of which the soil belongs to adjacent owners, are the property of such owners, who may remove them at pleasure. (*Id.*)

11. Laws passed for the protection of such trees, apply only to other persons than the owners; nor can the legislature authorize the infliction of a penalty upon the owner of the trees for removing them, unless the public have acquired title by purchase, or exercise of the right of eminent domain. (*Id.*)

12. Owners of land in a village made and filed a map thereof, laying out lots and a street thereon, and sold lots upon and with reference to the street; the village authorities afterward declared the street open, and it was worked, and built on, as a street:

Held, that there was a dedication and acceptance of the street throughout its entire extent, although a small portion (which was left open to the public, and on which lots had been sold), had never been worked by highway labor, and that trespass would not lie in favor of the owner of the soil, against an officer acting under direction of authorities of the village having power over its highways, for cutting trees and clearing away obstructions on the portion so unworked. (*Niagara Falls Suspension Bridge Co.* agt. *Backman*, 4 Lansing, 523.)

See OVERSEERS OF HIGHWAYS. (4 Lansing.)

HOTEL KEEPER.

See INNKEEPER. (46 N. Y.)

HUSBAND AND WIFE.

1. Where the real estate of a wife is mortgaged to secure the debt of her husband, she occupies the position of a surety, and she, and those claiming under her, are entitled to the benefit of the rules, prohibiting the dealing of the creditor with the principal debtor, to the prejudice of the surety. An extension of the time of payment, without her assent, is such a dealing, and discharges the mortgage. (*Bank of Albany* agt. *Burns*, 46 N. Y., 170.)

2. The agency of the husband to bind the

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- wife, to be inferred from the possession of the mortgage, has respect to, and is limited by, the terms of that instrument. (*Id.*)
3. The defendant, a married woman, has been in partnership with H., owning half the stock in trade, and half the real estate occupied for the purposes of the business, which was carried on in the name of H. and herself, her husband acting as her agent. Defendant bought out her partner, and with her knowledge, the business was subsequently carried on by the husband in his own name, without any control or interference by her; he taking possession of the assets of the firm, and using them in the business for his own benefit, until he failed, when he assigned the personal property for the benefit of creditors, without any claim thereto on the part of defendant:
- Held*, that the dissolution of the partnership was a revocation of the husband's agency, and her knowledge of the manner of conducting the business thereafter implied her assent, and would preclude her from deriving any benefit therefrom; and that a finding of the referee, that the business was defendant's, conducted by the husband as her agent, could not be sustained, either as a finding of fact or conclusion of law. Also, *Held*, that necessary expenditures upon the real estate, not exceeding the amount of personal property received from the wife, were properly made, and for any excess, if claimed the proper remedy was by creditor's bill for an accounting. (*Hamilton et al. agt. Douglass*, 46 N. Y., 218.)
4. Where a husband, with a fraudulent intent, obtained from his wife a power of attorney, authorizing him to do business in her name and as her agent, and after having by false and fraudulent statements established a fictitious credit, by means whereof he obtained, upon credit, large amounts of goods, a portion of which he sold in the original packages at less than cost, and then induced his wife to make an assignment, the wife having no knowledge of the fraudulent intent:
- Held*, that the wife is chargeable with knowledge of the fraudulent scheme of her agent, the husband, and the assignment is void. (*Warner agt. Warner*, 46 N. Y., 228.)
5. An acceptance, by a wife from her husband of a policy of insurance upon his life, procured by him for her benefit, without previous authority from her, is a sufficient adoption of his act, and constitutes a valid contract between her and the company issuing the policy. (*Thompson agt. The A. T. E. and S. Ins. Co.*, 46 N. Y., 674.)
- See MORTGAGE.* (46 N. Y.)
6. In an action brought by a husband against the wife, to have the marriage declared void by reason of her former marriage, upon the final hearing and a decision in favor of the wife, the court has power to award her extra expenses and counsel fees beyond the taxable costs. (*Griffin agt. Griffin*, 47 N. Y., 134.)
7. Where a husband in good faith, and without fraudulent intent, pays the purchase price of a parcel of land, and causes the same to be deeded to his wife, he at the time being out of debt, her title is valid as against his subsequent creditors. (*Ourtis agt. Fur.*, 47 N. Y., 399.)
8. Where an action in the nature of a creditor's bill is brought against a husband and wife by a judgment creditor of the former, to reach real estate claimed to have been fraudulently conveyed to the latter, and where after issue is joined the wife dies, the plaintiff failing to show fraud cannot have judgment for the interest of the husband in the land acquired upon the death of the wife. (*Id.*)
9. At common law the husband had the right of administration, and through administration he acquired the title to the personal property of his deceased wife not reduced to possession during coverture, subject only to the payment of her debts. These rights were preserved by the Revised Statutes (2 R. S., p. 75, § 29; p. 96, § 79), and have not been affected by the statutes of 1846 and 1849 in relation to married women. Those statutes give the wife control of her separate estate, with power of testamentary disposition, during her life; but, if she dies intestate, the rights of her husband, as her successor, are not affected, and he is not prevented from administration and consequent enjoyment of the property. (*Barnes agt. Underwood*, 47 N. Y., 351.)
10. The amendment of the 79th section of the statutes of distributions, in 1867, did not affect the right of the husband to administration and enjoyment of his deceased wife's personal estate, except in the case therein specified of her dying, leaving descendants. *Id.*
11. A wife owning real estate, as tenant

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in common with her husband, can maintain action for partition against him. (*Moore* agt. *Moore*, 47 N. Y., 467.)

2. In action against a married woman for fraud in a contract for the sale of her real estate, made by her husband as her agent, it is not necessary to join the husband. It is a matter "having relation" to her sole and separate property, and under the provisions of the statute of 1860, as amended in 1863. (chap. 172, Laws of 1862), she may be sued the same as if she were a *feme sole*. (*Baum* agt. *Mullen*, 47 N. Y., 577.)

13. These statutes have not altered the common-law liability of the husband for the personal torts of his wife, but when such torts are committed in the management and control of her separate property the rule is changed, and she only is liable.

See TRUSTS. (47 N. Y.)

14. Where a wife has an equitable interest in land conveyed to her husband, by reason of her having paid a part of the purchase money, such interest will be protected, as against her husband's subsequent creditors. (*Lormore* agt. *Campbell*, 60 Barb., 62.)

15. Where a husband had a vested interest in the personal estate which his wife owned at the time of the marriage:

Held, that the subsequent reduction of it to his possession, even though a part of it came into his hands after the taking effect of the act of the legislature of 1848, "for the more effectual protection of the property of married women," did not change his title to it. (*Briggs* agt. *Mitchell*, 60 Barb., 288.)

16. If the legal title to property is shown to have been in the husband, the *onus* is upon the wife, claiming it as her separate estate, to prove that it is such. This she cannot do, as against his creditors, by showing a conveyance to her, from the husband, without consideration. (*Id.*)

17. A post nuptial settlement, although it would be upheld in equity, as between the husband and wife, would be presumptively void as against antecedent creditors of her husband. (*Id.*)

18. A married woman, having a separate estate, may employ her husband, as her agent, to transact any or all of her business; and hence she may contract with him to do all her work, or any part of it, by the job, for a stipulated

price. (*Fairbanks* agt. *Northerwell*, 60 Barb., 406.)

See CRIMINAL LAW. (60 Barb.)
DEBTOR AND CREDITOR. (*Id.*)
EVIDENCE. (*Id.*)

19. In an action against husband and wife, affecting the husband's real property only he is authorized and required to have an appearance entered for his wife, upon service of summons on him alone, and without authority from her. (*Lathrop* agt. *Beacock*, 4 Lansing, 1.)

20. It is otherwise, where the action affects the wife's separate estate. (*Id.*)

21. A married woman may maintain an action against her husband to recover possession of her real estate from which she is excluded by him. (*Minier* agt. *Minier*, 4 Lansing, 421.)

22. Where a husband receives money from his wife to purchase real estate in the latter's name, and expends for the purpose no more than the sum received, the property is the wife's, although the payment is not made with the precise funds received. (*Id.*)

23. Husband and wife, when respectively plaintiff and defendant in an action, may, under laws 1867, chap. 387, testify in his or her own behalf. (*Id.*)

See DOWER. (4 Lansing.)
MARRIED WOMEN. (*Id.*)
SEPARATE ESTATE OF MARRIED WOMEN. (*Id.*)

I.

IMPRISONMENT.

See MOTIONS AND ORDERS. (47 N. Y.)

INCORPORATIONS.

See CORPORATIONS. (4 Lansing.)

INCUMBRANCERS.

See FORECLOSURE. (4 Lansing.)

INDICTMENT.

See FALSE PRETENCES. (46 N. Y.)
FALSE PRETENCES. (47 N. Y.)

1. Whether a conviction, upon an indictment charging the prisoner with aiding and abetting in the crime, can be had of a principal in the second degree, where the principal in the first degree cannot be convicted, *quere*. (*Temple* agt. *The People*, 4 Lansing, 119.)

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2. It seems, in such case, the indictment should properly charge the prisoner as principal. (*Id.*)
3. An indictment for perjury, which charges the offense to have been committed in an action pending in the supreme court of the city of New York; and that the referee who administered the oath was appointed by the supreme court of the city and county of New York is faulty in substance. (*Geston* agt. *The People*, 4 *Lansing*, 487.)
4. So also is an indictment for perjury found in New York county, which does not charge the offense as having been committed in that county. (*Id.*)
5. It should appear upon the face of an indictment for perjury, that the alleged false testimony was material to the determination of the question upon which it was given. (*Id.*)

INDORSEMENT.

See NOTES AND BILLS. (4 *Lansing*.)

INDORSER AND INDORSEE.

See NOTES AND BILLS. (4 *Lansing*.)

INDIGENT PERSONS.

1. In proceedings under title 1, chapter 20, part 1 of the Revised Statutes (1 R. S., 614), for the relief and support of indigent persons, the court of sessions is authorized by section 4, in case one of two persons equally liable is unable to contribute his entire proportion of such support, to require him to contribute according to his ability, and to require the other to pay the residue. (*Stone* agt. *Burgess*, 47 *N. Y.*, 521.)
2. An order reciting that the two are of sufficient ability, and directing the proportion each one is to pay, if the proportion is unequal, is in effect a determination that the one required to pay the less sum is unable to pay his full proportion, but is able to pay the sum fixed, and such order is valid. (*Id.*)

INFANTS.

1. In an action brought to obtain judicial construction of a will, it was adjudged that the title to a greater portion of the real estate of which the testatrix died seized, vested in her heirs upon her death, subject to the execution of a power of sale by the executors, and said executors were directed to sell and convey said real

estate in pursuance of a contract made by them. This was accordingly done, and the proceeds paid over to the county treasurer. Subsequently one of the heirs, an infant over eighteen years of age, died, leaving a will whereby she devised and bequeathed all of her property to her husband, who petitioned to have the share of his wife in the funds paid over to him.

Held, that the proceeds of the sale were to be regarded as personal property, and that the portion of the infant, heir could be disposed of by, and passed under, her will. (*Horton* agt. *McCoy*, 47 *N. Y.*, 21.)

2. Where real estate owned by tenants in common, of whom an infant, is one, is sold under and in pursuance of a judgment in a partition suit, instituted by others of the tenants in common, the portion of the proceeds belonging to the infant remains impressed with the character of real estate, and, as such, does not pass under the infant's will. (*Id.*)

See NEGLIGENCE. (47 *N. Y.*)
PARENT AND CHILD. (*Id.*)

3. An infant defendant cannot, while an infant, waive the defect that he did not appear by guardian. (*McMurry* agt. *McMurry*, 60 *Barb.*, 11)
4. It is not a mere irregularity to take a judgment against an infant defendant, without the appointment of a guardian *ad litem* for him. It is error in fact. (*Id.*)

See PARTITION. (60 *Barb.*)
PARENT AND CHILD. (4 *Lansing*.)
SUBMISSION OF CONTROVERSY. (*Id.*)

INJUNCTION.

1. Where an order of restoration at special term is made, after setting aside judgment of dispossession obtained by the plaintiff—the plaintiff being in lawful possession of the premises, it is irregular to include in such order of restoration granted to the defendant, an *injunction clause* restraining the plaintiff from entering into or interfering with the possession of the premises and restraining him from cultivating or otherwise using the premises. When restored to possession, the remedy of the defendant would probably be by action for any illegal entry or injury done the premises by the plaintiff. (*See S. O.*, ante, 17.) (*Dawley* agt. *Brown*, ante, 22.)
2. An *injunction order* only affects prop-

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- erty received, earned or due the judgment debtor before the making of the order. (*Atkinson* agt. *Swins*, ante, 84.)
3. Where the judgment debtor borrowed \$100, to pay his rent, after the injunction order in supplementary proceedings was made, but did not pay his rent until after it was served upon him: Held, that he was not in contempt for disobeying the order. (*Id.*)
4. A motion to *discontinue* an injunction, may be made before answer put in (*Town of Middletown* agt. *The Rondout & Oswego R.R. Co.*, ante, 144.)
5. A county judge has no power or jurisdiction, on granting an injunction *ex parte*, to grant an order to show cause, returnable before himself, why such injunction should not be continued. (*Id.*)
6. A county judge cannot hear a contested motion as to an injunction; because it requires the motion on notice to vacate shall be made before the court; and to show cause why the injunction should not be continued, being equivalent to a notice of motion for that purpose, he has no jurisdiction. (*Id.*)
7. Where a county judge grants an *ad interim* order of injunction, with an order to show cause returnable before him on a certain day, why such injunction should not be continued, by a non-appearance of the parties before him to show cause on the day specified, the injunction ceases, and there is none to be vacated. (*Id.*)
8. The business which corporations were created to carry on is not to be suspended, nor are their directors to be restrained from the discharge of their different duties, except by the court and upon notice. (*Id.*)
9. A county bond issued to obligee, or bearer possesses all the elements of commercial paper, and is subject to all the rules which pertain to commercial paper, and a purchaser and holder thereof, is entitled to all the rights which attach to negotiable instruments. (*Lindley* agt. *Dieffenderf*, ante, 346.)
10. A purchaser of such a bond, in good faith, for full value, and without notice, possesses a perfect title, thereto by delivery. (*Id.*)
11. An action and an injunction order restraining the party in possession of such bond from negotiating or disposing of it, is not notice to a subsequent bona fide purchaser for value, in the nature of his pendens at common law, as such notice does not apply to commercial paper, the title to which passes from hand to hand by delivery. (*Id.*)
12. A county judge has no power or jurisdiction, on granting an injunction *ex parte*, to grant an order to show cause, returnable before himself, why such injunction should not be continued. (*Affirming S. Co.*, at special term, ante, 144.) PARKER, J., dissenting. (*Town of Middletown* agt. *Rondout & Oswego R.R. Co.*, ante, 481.)
13. Where an application for an injunction is denied upon two legal propositions stated by the judge, (which are erroneous,) when it should have been denied upon the facts, instead of the law, the order of denial will not be reversed on appeal, as the judge below arrived at the correct conclusion, though for the wrong reason. (*Id.*)
14. Where separate attorneys appear on a motion, for different parties, in the same action, the costs of but one motion, \$10, can be allowed. (*Id.*)
- See EQUITY. (46 N. Y.)
APPEAL (47 N. Y.)
15. Under the acts of the legislature requiring a license to be obtained, for theatrical or dramatic performances, &c., in the city of New York (*laws of 1839*, p. 11; *laws of 1860*, p. 999; *laws of 1862*, p. 475,) an injunction will lie, to restrain impromptu performances, consisting of solos, duets and other songs, in a public place, or "garden," upon a raised stage or platform, by actors dressed in costumes adapted to the characters of the piece; for admission to which a price is charged. (*The Society for the Reformation of Juvenile Delinquents* agt. *Diers*, 60 Barb., 152.)
16. Where, upon a motion to dissolve an injunction, the defendant, in his affidavit, sets up new matter, explanatory, or in the nature of a confession and avoidance, the plaintiff may read new affidavits, in reply thereto. (*Id.*)
- See PARTNERSHIP. (60 Barb.)
ESTOPPER. (4 Lansing.)
SURFACE WATER. (*Id.*)
- ### INNKEEPER.
1. Plaintiff, a guest in defendant's hotel, offered to the book-keeper a large package containing jewelry, and without stating its contents, requested him to deposit it in the safe. The book keeper replied that it was not necessary, and requested plaintiff to take it to his room, saying, it would be just as safe there. When plaintiff was ready to

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leave, he packed his trunk, in which the package then was, delivered up the key of his room to the hotel clerk, and requested the trunk to be brought down immediately. This was not done; and upon the plaintiff's calling for it shortly after, it was found broken open and the package stolen:

Held, that defendant could not be held responsible for a refusal to receive; but that there was a "neglect to deposit" within the meaning of the innkeeper's act of 1853. (Laws of 1853, chap. 421.) (*Berkelson agt. French*, 46 N. Y., 268.)

2. That said act, however, only relieves the hotel proprietor from losses occasioned by such neglect; and that, as in this case, the loss happened at a time when the package, if it had been deposited, would have been returned to the guest to be packed prior to departure, defendant was liable. (*Id.*)

See BAILMENT. (60 Barb.)

INLAND NAVIGATION.

See FEDERAL COURTS. (4 Lansing.)

INSANITY.

See INSURANCE. (4 Lansing.)

INSOLVENCY.

1. A debtor's discharge under the Massachusetts insolvent laws operates to relieve him from liability for a debt, although the creditor was not mentioned in the schedule of insolvency proceedings, or notified of the proceedings, or the debt contained in the schedule of debts, where the omission is by mistake, inaccuracy or ignorance, and not willful or fraudulent. (*Hall agt. Robbins*, 4 Lansing, 462.)

INSOLVENT DEBTOR.

1. An order of discharge, issued under the act providing for the discharge of a debtor imprisoned on execution (art. 6, title 1, chap. 5, part 2, revised statutes), will not, *per se* protect a sheriff acting under it, unless it contain recitals of all the facts necessary to give jurisdiction to the court granting it. It is not sufficient that it shows general jurisdiction of the subject-matter; but that jurisdiction of the person and of the special case; was acquired by the taking of the necessary steps prescribed by the statute to that end. (*Bulymore agt. Cooper*, 46 N. Y., 236.)

2. The omission of an account of real and personal estate, as it existed at the time of the debtor's arrest, as required by sec. 4, is not supplied by allegations in the petition, that prior to the rendition of the judgment, in execution of which the debtor was arrested, he filed his petition in bankruptcy, was adjudged a bankrupt, and an assignment of all his property was appointed. (*Id.*)

See INSOLVENCY. (4 Lansing.)

INSURANCE ACCIDENT.

1. Defendant issued an accident policy of insurance upon the life of M., who, prior to procuring the policy, had been a canvasser for applications for insurance with defendant. The president had directed him to be cautious, as the company did not wish to insure insane persons, &c. Some time prior to the issuing the policy, M. had been insane; had been sent to an asylum, and discharged cured, and from that time forward had been sane. He did not disclose the fact of his former insanity upon application for a policy, but stated there were no circumstances rendering him peculiarly liable to accident.

Held, that the conversation with the president had no tendency to show a fraudulent concealment of material facts, and that it was not error in the court to charge, that the conversation had no bearing upon the application. (*Mallory agt. The T. Ins. Co.*, 47 N. Y., 52.)

2. Also held, that the court was correct in charging that if the deceased did not conceal any facts which in his own mind were material, in making the application, this policy was not void. (*Id.*)

3. By the terms of the policy the sum insured was to be paid if the insured "shall have sustained personal injury caused by any accident, * * * and such injuries shall occasion death," &c.

Held, that if a wound received by deceased, being produced by an accident, did not cause death, but did cause him to fall into the water, where he was drowned, then the death was accidental and defendant liable. (*Id.*)

4. Where, from the facts of the case, it appears that a violent death was either the result of accidental injuries or of a suicidal act of deceased, the presumption of law is against the latter. (*Id.*)

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INSURANCE COMPANIES.

1. Where the charter of an insurance company authorized the company to receive notes for premiums, in advance, and declared that such notes should be deemed the absolute property of the company, and might "be used for the payment of losses and liabilities, and for any other purpose connected with the business of the company; and when negotiated and in the hands of third persons, shall not be subject to any equitable claim or offset."

Held, that this authorized a transfer by the company of a premium note in absolute payment, or as security for the payment, of a valid debt of the company. (*The Great Western Ins. Co. v. Thayer*, 60 Barb., 633.)

INSURANCE, FIRE.

1. Where a policy of insurance on real property contained a clause that "if the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance," then the policy shall be void:

Held, that a sale of the property by the assured to a vendee in possession under a lease, with a simultaneous mortgage back for part of the purchase money, did not deprive the assured of an insurable interest in the property and consequent did not avoid the policy. (Following the case of *Hitchcock v. North Western Ins. Co.*, 26 N. Y., 68). *Savage v. Long Island E. R. Co.*, ante, 462.

2. Where a policy of insurance is issued "to the heirs and representatives of A. K. deceased, M. K., the executrix and trustee of the estate of A. K., took the title and might be considered as described by the words "heirs and representatives" and therefore the assured had an interest in the property insured. (*Id.*)
3. Plaintiff being the owner of a woolen factory and machinery therein, contracted to sell the same to C., the deed to be executed when the whole purchase-price was paid, C. to pay for insurance. Plaintiff insured with defendant, C. paying the premium. The policy contained conditions precedent, in case the same was held as collateral security, and also restrictions upon the use of inflammable liquids used as a light. Kerosene oil was used for lighting purposes:

Held, 1st. Plaintiff had an insurable interest in the property itself. 2d. The policy was in fact taken for C.'s benefit upon the property, and not upon the debt against him, and was not held as collateral security within the meaning of the condition. 3d. That inasmuch as the legislature has declared certain grades and qualities of kerosene proper and safe to use, the right to take judicial notice could not be invoked, to establish its inflammability (i. e., explosive) qualities; but it was incumbent upon defendant to show, that the kerosene used was in fact "inflammable." (*Wood v. The Northwestern Ins. Co.*, 46 N. Y., 421.)

4. Defendant issued a policy of insurance to L. J. S. upon his dwelling-house. The policy contained a clause, that if the property was sold or transferred, or any change took place in title or possession, without the consent of the company, it would be void. The property was transferred to plaintiff March 4th. The policy was renewed March 21st, and was transferred to plaintiff April 15th, on the same day defendant's agent consented to the transfer of the policy. L. J. S. remained in possession. During a temporary absence he left the house in charge of B., and it was destroyed by fire:

Held, that the renewal revived the original policy, and continued it with all the virtue which it would have had for any purpose, if it had not expired. That the consent to the assignment was equivalent to an agreement, to be liable to the assignee upon the policy as a subsisting operative contract, for which agreement the retention of the premium received on the renewal was a good consideration. That there was no change of possession within the meaning of the contract, and that the company was liable. (*Shearman v. The Union Fire Insurance Co.*, 46 N. Y., 526.)

5. Under the provisions of the act of 1853, to provide for the incorporation of fire insurance companies (chap. 466, laws of 1853.), a personal demand of the maker of a premium note, given to a mutual fire insurance company, is only made necessary, where it is sought to recover a judgment for the entire note, as a penalty for neglecting to pay a partial assessment thereon. Assessments upon notes given prior to the passage of the act were unaffected by it, and could be recovered without such demand. Where, therefore, a premium note given prior to 1853 was regularly assessed to its full amount, the time of payment fixed, and notice

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of the assessment duly published, as required by the charter and by the laws of said company, the whole note became due and payable upon the day fixed for its payment, and after the lapse of six years therefrom, an action upon it is barred by the statute of limitations. (*Sands agt. Lilienthal*, 46 N. Y., 541.)

6. In an action upon a policy of fire insurance covering a stock of goods, which policy expressly declares that only goods "not hazardous," and "hazardous," were insured, and that the keeping of "extra hazardous," or "specially hazardous" goods on the premises shall avoid the policy.

Held, that evidence showing the application was for a policy upon a stock such as is usually kept in a country store, and that in response to such application this policy was sent, was inadmissible, either as an admission by defendant that the policy was intended to conform to the application, or as notice to the company that the insured kept in his store such merchandise as is usually kept in country stores, including goods coming within the prohibited classes. (*Pindar agt. The E. Fire Ins. Co.*, 47 N. Y., 114.)

7. The fact that the insured ordered a different policy, and did not discover until after the fire that the one issued was not in accordance with his order, is immaterial. The failure of the insured to read his policy will not enlarge the liability it imposes. (*Id.*)

8. A policy of fire insurance contained the following clauses in writing:—"The above premises are privileged to be occupied as hide, fat melting, slaughter and packing houses, and stores and dwellings, and for other extra hazardous purposes." In a classification of hazards annexed to the policy the occupations specifically privileged were not embraced in the "extra hazardous" class, but came within a general clause under the head of "specially hazardous."

Held, that the words "or other extra hazardous purposes" must be taken to mean purposes of the same class as those before specified, and that the assured had the right to use the premises for any specially hazardous purposes. (*Reynolds agt. Commercial Fire Ins. Co.*, 47 N. Y., 597.)

9. Insurance companies are not restricted in the right to insert such terms and conditions in their policies as they see fit; but where equivocal language is used, especially such as is calculated

to mislead, it is to be construed most strongly against the company using it. (*Id.*)

10. Where the language employed in a policy to specify the purposes for which the building insured may be used is ambiguous, knowledge by the company of the purpose for which it is used is a circumstance proper to be considered in determining the intent. (*Id.*)

11. Where a policy of insurance against fire referred to the application "for a more full and particular description, and forming a part of this policy;" and declaring that the policy was made and accepted in reference to the terms and conditions therein contained and thereto annexed, which were declared to be a part of the contract:

Held, that by force of such reference, the application was made a part of the contract. (*Shoemaker agt. The Glens Falls Ins. Co.*, 60 Barb., 83.)

12. Whatever is expressly embraced in a policy, or in any condition or collateral instrument annexed thereto and made expressly a part of the contract, is a warranty in respect to the facts specified therein, or clearly referred to. (*Id.*)

13. When one following the business of an insurance agent has authority from an insurance company to solicit and act on proposals for insurance, and to receive the premiums therefor on its behalf, the public may assume that he is authorized to make insurance for it in the ordinary way; and this is so, notwithstanding the company have placed special restrictions upon his powers; *e. g.*, where he is restricted to making insurance by policies countersigned by himself, he has, presumptively, authority to make insurances verbally. (*Ellis agt. Albany City Fire Ins. Co.*, 4 Lansing, 433.)

14. A power of attorney from an insurance company giving one authority as agent, to receive proposals for, and make insurances by policies countersigned by himself, also to renew the insurances, assent to assignments and transfers, and do all lawful acts and business, pertaining to his agency, which may, from time to time, be given him in charge by the company, does not constitute him a general agent for the company. (*Id.*)

15. When the charter of an insurance company provided that the company might receive, as additional security to its dealers, notes for premiums in ad-

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vance, under a regulation and agreement that they should "be deemed the absolute property of the company, and might be used for the payment of loss and liabilities, and for any other purpose connected with the business of the company, and when negotiated and in the hands of third persons, shall not be subject to any equitable claim or offset."

Held, that the notes so given might be transferred as collateral for debts due from the company, or in absolute payment, without being in the hands of the transferee subject to an equitable defense, by the maker, of want of consideration, &c. (*Great Western Ins. Co. agt. Thayer, 4 Lansing, 456.*)

See INSURANCE. (4 *Lansing.*)

INSURANCE—LIFE.

1. An acceptance by a wife from her husband of a policy of insurance upon his life, procured by him for her benefit, without previous authority from her, is a sufficient adoption of his act, and constitutes a valid contract between her and the company issuing the policy. (*Thompson agt. A. T. L. & S. Ins. Co., 46 N. Y., 674.*)

2. Where, by a policy of life insurance, the sum insured is made payable to the "assured, his executors, administrators and assigns," for the benefit of a third person, an action thereon is properly brought in the name of the personal representative of the assured, who, by the policy, is constituted trustee of an express trust, within the meaning of section 113 of the Code. (*Greenfield agt. Mass. Mut. Life Ins. Co., 47 N. Y., 430.*)

3. Where, in such action, upon motion of the insurance company, the beneficiaries named in the policy are ordered to be and are made parties, the company is precluded from objecting that they are not properly joined with it as defendants. (*Id.*)

4. In an action brought against a Massachusetts life insurance company, the complaint admitted the non-payment of premiums due, but alleged that there was due upon said policy a certain sum, under a statute of said State ("the non-forfeiture act," passed April 10, 1861), which provides that no life policy, issued by a company chartered by the commonwealth, shall be forfeited for non-payment of premium, until the expiration of a term of temporary insurance therein provided for, and also alleged notice and

proof of death, and a promise of the company to pay the sum claimed to be due. The answer denied that there was anything due upon the policy, under the provisions of the statute referred to in the complaint.

Held, that the action was based upon the policy, and not upon an amount stated; that the answer put in issue the alleged indebtedness of the policy, and the question was whether the temporary policy provided for by said statute was in life at the time of the death of the assured; and upon this issue the testimony of an experienced actuary, that he had made the computation in accordance with the statute, and that the temporary policy created thereby had expired prior to the death of the assured, was competent, and the rejection thereof error. (*Id.*)

5. Also *held*, that plaintiff had no right to substitute upon the trial, for the cause of action set out in the complaint, one founded upon an account stated, and thereby exclude this defense for the reason that the answer did not set up affirmatively an error or fraud in the statement of the account. (*Id.*)

6. An insurance company has the right to waive any of the conditions of the policy as to proof, presentation of claim, &c., and a promise to pay, with knowledge of the facts, is such waiver. (*Id.*)

2. In an action upon a life policy, containing a clause which rendered it null and void in case the assured should die by his own hand, the defendant pleaded that the insured had caused his own death and annulled the policy; and it appeared that he had died by suicide from a pistol shot, there were indications in the room he occupied that he had also taken poison, and a letter from him was found there, telling his brother that he had suffered from the fear of becoming insane from maladies which he despaired of curing, and had concluded to end his sufferings, that night, by poison, which he had carried for several days; it also appeared that he was afflicted with a disease, of which the tendency was to produce a morbid mental state; that he was a spiritualist; that for some days immediately preceding his death he appeared a little excited, was absent-minded and not as cheerful or talkative as ordinarily. The court refused to submit the question of insanity to the jury, and also the question whether the suicide was

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involuntary or voluntary, and directed a verdict for the defendant:

Held, that there was no error. (*Fowler* agt. *Mutual Life Ins. Co.*, 4 *Lansing*, 202.)

INTEREST.

1. Interest on the value of goods at the time of the conversion is no more in the discretion of the jury than the value; it is as necessary a part of complete indemnity as the value itself. (*Wahle* agt. *Butler*, ante, 5.)

See COSTS. (47 *N. Y.*)

See FORECLOSURE. (4 *Lansing*.)

INTERNAL REVENUE ACT.

1. The power of summary seizure and forfeiture conferred by the 74th sec. of the act of congress known as the *Internal Revenue Act*, upon the revenue officials, to be exercised at their discretion, is an extraordinary power, in derogation of common right. And if it can be maintained, consistently with that clause of the constitution which provides that no person shall be deprived of his property without due process of law, or consistently with that other provision which declares that the right of the people to be secure in their effects against unreasonable seizures, shall not be violated, the statute conferring it must be most strictly interpreted, and cannot be extended, as against the citizen, beyond what the language of the act imperatively requires. (*Crosby* agt. *Brown*, 60 *Barb.*, 648.)
2. It is only in case of contumacy in refusing to produce and exhibit the receipt for the license tax which the person of whom its production is demanded has, that the seizure mentioned in sec. 74 of the act, is authorized. And the power conferred, to seize, assumes that there is a receipt which may be produced. (*Id.*)

INVESTMENTS.

See EXECUTORS AND ADMINISTRATORS. (4 *Lansing*.)

IRREGULARITY.

See ORDER OF COURT. (4 *Lansing*.)

J.

JOINDER OF CAUSES OF ACTION.

See PRACTICE. (4 *Lansing*.)

JOINDER OF PARTIES.

See PRACTICE. (4 *Lansing*.)
SURFACE WATER. (*Id.*)

JOINT AND SEVERAL LIABILITY.

See BREEDERS. (4 *Lansing*.)

JOINT TENANTS OR OWNERS.

See TENANTS IN COMMON. (47 *N. Y.*)

JUDGE.

See BASTARDY PROCEEDINGS. (4 *Lansing*.)

JUDGE'S CHARGE.

See HIGHWAYS. (60 *Barb.*)
PHYSICIANS AND SURGEONS. (*Id.*)
RAILROAD COMPANIES. (*Id.*)
SEDUCTION. (*Id.*)
USE AND OCCUPATION. (*Id.*)

1. Where in an action of trespass, for diverting waters on to the plaintiff's land, the defendant justified as overseer of public highways, and whether the diversion was wrongful, depended upon facts which were, and fairly might be, controverted upon the evidence, and the court charged as follows, viz: "I think, therefore, that the diversion of these waters upon the plaintiff's land was wrongful, and the plaintiff is entitled to recover."

Held, that the charge was an instruction to the jury that the plaintiff was entitled to recover, and not a mere intimation of opinion upon a question of fact, and was error. (*Moran* agt. *McCleane*, 4 *Lansing*, 238.)

See COMMON CARRIERS. (4 *Lansing*.)
DAMAGES. (*Id.*)
QUESTION OF FACT. (*Id.*)

JUDGMENT.

1. The recovery in all actions should be for what is lost, whether by breach of contract express or implied, or by tort. Gold coin is not merchandise, but one kind of money; and in an action of tort to recover for its loss, the judgment should be for gold, and not for its value in currency. (*Kellogg* agt. *Swamy*, 46 *N. Y.*, 291.)

See APPEAL. (46 *N. Y.*)
MOTIONS AND ORDERS. (*Id.*)
PENALTIES. (*Id.*)

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LIEN. (47 N. Y.)
MOTIONS AND ORDERS. (Id.)
TRIAL. (Id.)

2. A judgment rendered by a court that has not obtained jurisdiction of the subject matter to which it relates, and of the persons to be bound thereby, is utterly void. (*Phelps agt. Baker*, 60 Barb., 107.)

3. If there is any exception to the rule, it is to be found in cases in which the proceedings are *in rem*, and where, from the necessity of the case, it is exceedingly difficult, if not impossible, to discover the parties owning or interested in, the property, and when delay for the purpose of bringing them into court, would result in the destruction of the property, or in a total failure of justice. (Id.)

4. It has been repeatedly held that when a suit is commenced by the attachment of property, the judgment recovered therein is valid, so far as the title to the property attached is concerned, but inoperative for any other purpose, as to the defendant who has not appeared, or been personally served with process. (Id.)

5. This court has power to set aside a judgment, or motion, where it clearly appears that the plaintiff had no legal cause of action. (Id.)

6. If a creditor give his debtor in execution permission to go at large beyond the jail, or its liberties, the judgment is absolutely discharged. (*Bonesteel agt. Gurlinghouse*, 60 Barb., 388.)

See FORECLOSURE SUIT. (60 Barb.)
INFANTS. (Id.)
TENANTS IN COMMON. (Id.)

7. A satisfaction piece given to the debtor by the ostensible owner of a judgment is, it seems, equivalent to a receipt for the money, and evidence against the latter, in an action by the real owner, for money had and received. (*Booth agt. Farmers' and Mechanics' Nat. Bk.*, 4 Lansing, 301.)

8. But where the president of a bank, assuming to act as such, executed and delivered to the judgment debtor a satisfaction piece of a judgment recovered in favor of the bank, but assigned to a third person, and the assignee not standing in the position of one who had advanced money, or paid value *bona fide* on the strength of the satisfaction, sued the bank for money had and received, it seems that no presumption of authority in the president from the bank could arise in

the assignee's favor, and that a receipt of the money by its president, did not establish the liability of the bank therefor. (Id.)

See ACTION. (4 Lansing.)
APPEAL. (Id.)
DIVORCE. (Id.)
EVIDENCE. (Id.)
EXECUTION. (Id.)
MARRIED WOMAN. (Id.)
NOTES AND BILLS. (Id.)
ORDER OF COURT. (Id.)
SUPERVISORS. (Id.)

JUDGMENT CREDITOR.

See FORECLOSURE. (4 Lansing.)

JUDGMENT DEBTOR.

1. A creditor at large, with a judgment which is a general lien upon all his debtor's real estate, cannot maintain an action in equity to set aside the fraudulent conveyances of his judgment debtor, which obstructs the collection of his judgment out of such real estate, without the issuing of an execution and ascertaining that it cannot be collected of the personal property of his debtor. (*The authorities upon this question examined and considered*). (*Payne agt. Sheldon*, ante, 1.)

2. Where an execution has been duly issued by a judgment creditor to the sheriff of county, and by him returned unsatisfied, a complaint by the judgment creditor, in equity, to reach the property of the judgment debtor is defective if it does not allege that the execution was issued to the sheriff of the county where the judgment debtor resided at the time of its issue and of the recovery of the judgment. (Id.)

See EXECUTION. (4 Lansing.)

JUDGMENT ROLL.

See EVIDENCE. (4 Lansing.)
JUDGMENT. (Id.)

JUDICIAL NOTICE.

1. Plaintiff being owner of a woolen factory and machinery therein, contracted to sell the same to C., the deed to be executed when the whole purchase price was paid, C. to pay for insurance. Plaintiff insured with defendant, C. paying the premium. The policy contained restrictions upon the use of inflammable liquids as a light. Kerosene was used for lighting purposes. (*Wood agt. The N. W. Ins. Co.*, 46 N. Y., 423.)

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2. That inasmuch as the legislature has declared certain grades and qualities of kerosene proper and safe to use, the right to take judicial notice could not be invoked, to establish its inflammable (i. e., explosive) qualities; but it was incumbent upon defendant to show that the kerosene used was in fact "inflammable." (*Id.*)

JUDICIARY.

See CONSTITUTION. (47 N. Y.)

JUDICIARY ACT OF CONGRESS.

See FEDERAL COURT. (4 Lansing.)

JURISDICTION.

1. The plaintiff is not entitled to costs under the Revised Statutes because in his complaint he claimed \$1080 damages, an amount exceeding the jurisdiction of a justice of the peace. (*Turner agt. Van Riper, ante, 53.*)
 2. A justice of the peace has jurisdiction of an action on a note or other contract, and in an action of trespass, although the damages claimed may exceed \$200, but because of the amount of the claim, he cannot try it. This description of actions is not that to which sub. 3 of § 304, is intended to apply. The court has jurisdiction of such actions, but not of the particular cases. (*Id.*)
 3. It would seem that the courts have heretofore sanctioned this injustice, as to the claim for the amount of damages destroying the jurisdiction of a justice in the action, and the inquiry is whether that rule of law is still in force. (*Id.*)
 4. The court does not acquire jurisdiction to issue the order, unless at the time of the presentation of the petition there is indorsed thereon an affidavit in the form prescribed by section 5, sworn to by the applicant. (*Bullymore agt. Cropper, 46 N. Y., 236.*)
 5. This court has no authority to correct any supposed errors of a jury in the assessment of damages. (*Williams agt. Sargeant, 46 N. Y., 481.*)
- See APPEALS. (46 N. Y.)
 FOREIGN JUDGMENTS. (*Id.*)
 SURPLUS MONIES. (*Id.*)
 WILLS. (*Id.*)
6. Under the provisions of sections 352 of the Code, the general term of the common pleas of the city of New York has no jurisdiction to review,

upon appeal, a judgment of affirmance by default of the general term of the marine court. The appeal in that section prescribed is only from an "actual determination." A judgment of affirmance by default is not an actual determination. Jurisdiction cannot be conferred upon an appellate court by consent or stipulation of the parties. When an inferior court has rendered judgment without jurisdiction, the appellate court may so far act as to reverse the judgment for the want of jurisdiction. (*McMahon agt. Bauer, 47 N. Y., 67.*)

2. A state court has jurisdiction of an action founded upon a contract, although the validity of a patent may be involved therein. (*Middlebrook agt. Broadbent, 47 N. Y., 443.*)

See ASSESSMENT AND TAXATION. (47 N. Y.)

MOTIONS AND ORDERS. (*Id.*)
 TRIAL. (*Id.*)

8. Posting citations in public places within the jurisdiction of the court in which proceedings are instituted, cannot confer any legitimate jurisdiction over defendants who are non-residents, and do not appear to answer, whether they have notice of the suit or not. The effects of such proceedings are purely local, and elsewhere they will be held to be mere nullities. (*Phelps agt. Baker, 60 Barb., 107.*)

See BASTARDY PROCEEDINGS. (4 Lansing.)

CONTRACTS. (*Id.*)
 DEFENSES. (*Id.*)
 DIVORCE. (*Id.*)
 FEDERAL COURTS. (*Id.*)
 JUDGMENTS. (*Id.*)
 ORDER OF COURT. (*Id.*)
 RELIGIOUS CORPORATIONS. (*Id.*)

JUROR.

1. A person employed in an establishment where castings, farming implements and machinery are made from melted pig and old iron, is not exempt from jury service within the statute (2 R. S., 415, sec. 33), as a person "in actual employment of any glass, cotton, linen, woolen or iron manufacturing company by the year, month, or season." (*People ex rel. Blake agt. Holdridge, 4 Lansing, 511.*)
2. A partner in an iron manufacturing company, having an interest in its profits, who is in the actual employment of the company, and does its work and business by the year, is within the meaning of the act. (*Id.*)

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JURY.

1. A special jury will not be ordered to try the question of title, in the nature of *quo warranto*, the office of justice of a district court in the city of New York, there being nothing in the circumstances to make it such an extreme case as would warrant a special jury. (*The People* agt. *McGuire*, ante, 67.)

TRIAL. (47 N. Y.)

JURY TRIAL.

- See EJECTMENT. (4 Lansing.)
LANDLORD AND TENANT. (Id.)
QUESTION OF FACT. (Id.)

JUSTICE'S COURTS.

1. Section 371 of the Code provides for a modification of the judgment appealed from—not a reversal of the judgment in determining the question of costs. (*Moran* agt. *McCleane*, ante, 77.)

2. Where the appellant specified in his notice of appeal the grounds of the appeal as follows: 1. The judgment is against the weight of evidence. 2. It is not supported by the evidence. 3. On the evidence the plaintiff was not entitled to recover. 4. The judgment is contrary to law upon the evidence:

Held, that these grounds contained no specification in which the judgment should have been more favorable to the appellant, unless they be construed as claiming that it should have been in his favor, instead of being against him, which is equivalent to claiming a reversal, which is not contemplated by this section. It was a wholly useless proceeding. (*Id.*)

3. Where judgment was rendered before the justice for the defendant for costs, and the plaintiff appealed to the county court and recovered judgment for \$60 and costs; and in his notice of appeal alleged that the judgment should have been in his favor and against the defendant, and there was no evidence to warrant the judgment:

Held, that this specification of the particulars in which the judgment should have been more favorable to the appellant, did not call upon the defendant to make an offer to modify the judgment, as such specification indicated only a wish to have the judgment vacated, and another entered in his favor, which was not authorized by § 371 of the Code (*See Moran* agt. *McCleane*, ante, 77.) (*Colebert* agt. *Hall*, ante, 80).

4. But the plaintiff, being the prevailing party in the county court, was entitled to costs. (*Id.*)

5. The defendant, in his notice of appeal to the county court, alleged that the judgment of the justice for \$169 25 damages and \$8 05 costs against him, should have been more favorable to him in the following respects:

1. It should have been in his favor and against the plaintiff, for \$200.

2. It should have been in his favor, and against the plaintiff, for damages and costs.

3. It should have been for a *lode* sum, to wit, for only \$50 against appellant.

4. It should have been for a less sum, to wit, for only \$75. (*Wadley* agt. *Davis*, ante, 82).

6. On the trial before a referee in the county court, the plaintiffs recovered judgment for \$155 27 damages, or \$13 98 less than the recovery before the justice.

Held, that the plaintiffs were entitled to costs. (*Id.*)

7. This court has decided at the present term, in the case of *Moran* agt. *McCleane* (ante, p. 77), and in *Colebert* agt. *Hall* (ante, p. 80), that a specification that the judgment should have been for the appellant instead of the respondent, was not admissible under section 371 of the Code. (*Id.*)

8. This court has also decided, in *Putnam* agt. *Heath* (44 How., 268), that a specification in the notice of appeal that the judgment should have been more favorable in two sums of different amounts, was not a compliance with that section. (*Id.*)

9. The defendant appealed from a judgment of a justice of the peace, rendered against him for \$95 damages and \$5 costs, to the county court, and he in his notice of appeal stated that "the judgment should have been more favorable to him in this particular, to wit: That said judgment should not have been for more than \$25, damages besides costs." The plaintiff did not serve any order to modify the judgment of the justice. (*Young* agt. *Fingar*, ante, 159).

10. The plaintiff obtained a verdict in the county court for \$49 damages. The county court held and ordered that the plaintiff should recover costs in such court. The defendant appealed to this court, from such order of the county court, and this court affirmed the order. (*Id.*)

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11. The defendant thereupon appealed from the last mentioned order, to the court of appeals: That court held unanimously (by a written opinion) that the order was erroneous, and that the defendant was entitled to costs in the county court; for the reason that the plaintiff did not serve an offer to modify the judgment of the justice. But dismissed the appeal on the ground that such order was not appealable. (*Id.*)

12. On a motion thereafter by the defendant, at general term of this court, for a reargument therein, whether the plaintiff or the defendant was entitled to costs, in the county court:

Held, that it would be disrespectful to the court of appeals to disregard the opinion of that court, on the ground that such opinion is not absolutely controlling, because that court dismissed the defendant's appeal there. It was undoubtedly delivered with a view of putting at rest the question as to which party should recover costs in the county court in cases like this, as the decisions of this court have been conflicting in different districts on the question:

Held, also, that in accordance with the opinion of the court of appeals, a reargument of the question, be granted, and that the defendant is entitled to costs in the county court, and that the order of the county court allowing costs to the plaintiff, be reversed, and that the defendant have a judgment for costs in that court, &c. (*Id.*)

See APPEAL. (47 N. Y.)

COSTS. (*Id.*)

JUSTICE OF THE PEACE. (4 Lansing.)

COSTS. (*Id.*)

JUSTICE'S COURT IN THE CITY OF BROOKLYN.

See STATUTES. (47 N. Y.)

JUSTICES OF THE PEACE.

1. The refusal of an adjournment by a justice of the peace, upon application under 2 R. S. 239, sec. 75, for absence of a witness, on the defendant's affidavit, which contains no allegation that he cannot safely proceed to trial without the witness, the materiality of whose testimony is asserted upon the deponent's belief, on advice of his counsel, there being no proof that the counsel had knowledge of the testimony desired, and it appearing that the defendant had no knowledge of the tes-

timony, will not be disturbed on appeal. *Burgett* agt. *Edwards*, 4 Lansing, 193.)

2. Nor is it error if the justice refuse an attachment on such an affidavit, although service of a subpoena is duly shown. (*Id.*)

See BASTARDY PROCEEDINGS. (4 Lansing.)

COSTS. (*Id.*)

JUSTICES OF THE SUPREME COURT.

See CONSTITUTION. (47 N. Y.)

See BENEVOLENT SOCIETIES. (60 Barb.)

L.

LABORER AND LABOR.

See STATUTES. (46 N. Y.)

See RAILROAD COMPANY. (4 Lansing.)

LACHES.

1. Laches in making an application for leave to plead a discharge in bankruptcy, is a sufficient ground for denying it. (*Medbury* agt. *Swan*, 46 N. Y., 200.)

See FORECLOSURE. (47 N. Y.)

See CONTRACT. (4 Lansing.)

PRINCIPAL SURETY. (*Id.*)

LANCASTER, VILLAGE OF.

See HIGHWAYS AND STREETS. (4 Lansing.)

LANDLORD AND TENANT.

1. The mere agreement of a landlord to repair, has reference only to the condition of the building or premises demised for the purpose of their profitable use, and the pecuniary benefit to be derived from their enjoyment or loss from being deprived of their use in such state of repair as the agreement intended. (*Flynn* agt. *Hutton*, ante, 333.)

2. Such a simple agreement or covenant, in no way contemplates any destruction of life or casualties to the person or property of any one, which might accidentally result from an omission to fulfil the agreement in every respect. (*Id.*)

3. For the proposition that a landlord under contract (generally) to keep the premises in repair is for a breach thereof, also further liable to his tenant, as

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- is *tort*, for wilful refusal or neglect to perform his obligation, no warrant is to be found in principle or authority. (*Id.*)
4. His subsequent parol promise, after being notified of defects, to make necessary repairs, unless founded on a new consideration, superadds nothing to his original obligation, and furnishes no ground for awarding additional damages, except so far as the tenant is by such promise delayed and limited in making them (primarily) at his own expense. (*Id.*)
 5. A claim cannot exist on the part and behalf of sufferers from defects to a piazza appurtenant to a tenement house, occurring from natural causes—from natural wear and tear, in an action for a *tort* or negligence against the landlord, whose only obligation exists in contract with the tenant in possession, and one can only be founded on some other negligence, trespass or wilful breach of a direct public or private duty to the party injured. (*Id.*)
 6. In this case, *held*, that the negligence of the parents, in suffering the plaintiff, a child about three years of age, to wander upon this dilapidated piazza or balcony, and exposing it to danger and the injuries it received was so gross and unambiguous as to constitute contributive negligence and should prevent a recovery by the plaintiff for damages for such injuries. (*Id.*)
 7. A covenant for quiet enjoyment in a lease means only that the tenant shall not be evicted by a paramount title. It relates only to the title, and not to the actual possession or undisturbed enjoyment, where there is no eviction from the premises demised. (*Johnson* agt. *Oppenheim*, ante, 433.)
 8. So long as the tenant remains in possession and use of a part of the building, it is conclusive evidence against him that it has not been destroyed and that it is not untenanted within the meaning of the act of 1860. (*Id.*)
 9. It must be taken to have been the true intention of the legislature in the passage of the act of 1860, to absolve the lessee, in the cases contemplated by the statute, from the payment of rent, provided he avails himself of the privilege given to *quit and surrender possession* of the leasehold premises and of the land so leased or occupied. (*Id.*)
 10. It is *no surrender* in law or in fact, of leasehold premises by a tenant in possession claiming that the premises have become untenanted, and his right to abandon under the act of 1860, where he moves out on a previous notice to the landlord, and delivers to him the key of the main building, which is refused, but leaves a sub-tenant of the lessee of a portion of the building, in undisturbed possession of his portion with a key to another outer door of the same, also in his possession. The possession of the sub-tenant is that of the tenant as respects the rights of the landlord under the statute. (*Id.*)
- See LEASE. (46 N. Y.)
11. When a tenant is in possession under a parol agreement void by the statute of frauds, and has occupied for a year, paying the rent monthly, this creates a tenancy from month to month, which can only be terminated by a month's notice to quit, expiring with the end of some month reckoning from the beginning of the tenancy. (*People* ex rel. agt. *Darling*, 47 N. Y.)
- See AUSTIN agt. STRONG (mem.), 47 N. Y., 679.)
12. Before the expiration of his lease, a tenant abandoned the demised premises, and possession thereof was taken without his privity or consent, by another:
- Held*, that no such relation of landlord and tenant arose from the occupancy of the latter, between him and the lessor, as authorized a removal for holding over after the term of the lease, by summary proceedings under the statute. (*People* agt. *Hovey*, 4 Lansing, 86.)
13. By amendment to the revised statutes (chap. 684, laws of 1857, sec. 2), the matters in controversy in such proceedings may be tried by the magistrate without a jury. (*Id.*)
- See EVIDENCE. (4 Lansing.)
LEASE. (*Id.*)
- LANDS.
- See ASSESSMENT AND TAXATION. (46 N. Y.)
- LEASE.
1. Where a tenant yields the possession of the demised premises, in pursuance, or in consequence of a judgment for the recovery of possession, to the person adjudged to be the rightful owner, of the paramount title, it is an eviction, and he is discharged from the payment of rent. (*The H. Life Ins. Co* agt. *Sherman*, 46 N. Y., 370.)
 2. A lease contained a covenant upon the part of the tenant, not to sublet

Direct.

without the written consent of the landlord, under penalty of forfeiture, &c. The tenant sublet with the knowledge of the landlord, who subsequently received the rent:

Held, that this was a waiver of the forfeiture, and the right of the landlord founded upon the subletting, or the occupancy thereunder was gone. (*Ireland* agt. *Nichols*, 46 N. Y., 413.)

3. A guardian in socage may lease the lands of his ward for a term as long as he continues guardian, or for any number of years within the minority of the ward. The lease, however, is subject to its being defeated by the appointment of another guardian, pursuant to the statute, and his election to avoid it. (*Emerson* agt. *Spicer*, 46 N. Y., 594.)

See LANDLORD AND TENANT, (60 Barb.)

4. A provision in a written assignment of a lease, written thereon as follows: "He (the assignee) to pay the rent, &c., as herein provided as fully as I am bound to pay the same;" imports an obligation on the part of the assignee, to pay, coextensive with the assignor's liability, and no further. (*Wright* agt. *Kelly*, 4 Lansing, 57.)

See LANDLORD AND TENANT. (4 Lansing.)

LEGAL CONCLUSION.

See SUBMISSION OF CONTROVERSY. (46 N. Y.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW. (*Id.*)

LEGISLATURE.

See CONSTITUTIONAL LAW. (46 N. Y.) STATUTES. (*Id.*)

LESSOR AND LESSEE.

See LANDLORD AND TENANT. (4 Lansing.) LEASE. (*Id.*)

LEVY AND SALE OF PROPERTY.

See EXECUTION. (4 Lansing.)

LIBEL.

1. The proprietors of a mercantile agency engaged in collecting and publishing for circulation among all its patrons, information as to the standing and financial credit of merchants and traders, are liable for a false report thus disseminated, injurious to the credit of the subject of it, although

made in good faith and upon information deemed reliable. (*Sunderlin* et al. agt. *Bradstreet* et al., 46 N. Y., 188.)

2. Defendants having been defrauded of a large amount of goods, by reason of false representations, and having probable cause to believe that plaintiff was a party to the fraud, signed a paper, in which they stated they had been "robbed and swindled" by plaintiff and others, and agreed to share equally the expenses of prosecuting the offenders criminally:

Held, that the preparation and signing of the paper was a lawful transaction, and it was a privileged communication; that the terms used, though strong and plain, were not irrelevant, and in the absence of actual malice did not take away the privileged character of the communication. (*Klinck* agt. *Colby*, 46 N. Y., 428.)

3. The exhibition of the paper to an agent of one of the parties defrauded, for the purpose of procuring the signature of the principal was privileged. (*Id.*)

3. Where, under sec. 165, of the Code, defendant in an action of libel or slander pleads the truth of the matter charged as defamatory, and also matters in mitigation, the allegations in justification, although unsustained by proof, are no longer evidence of malice, to be considered by the jury and taken as enhancing plaintiff's damages. (*Id.*)

LIEN.

1. In an action brought after a debtor's discharge in bankruptcy, to enforce a lien upon property held by the debtor's wife, claimed to have existed at the time of the discharge, under the provisions of sections 51 and 52 of the statute of uses and trusts (1 R. S., Edmond's ed., 677, sections 51 and 52.)

Held, that those sections do not give a specific lien upon the property, but an equitable right to be enforced by suit in equity, after all available legal remedies are exhausted; that the commencement of the equitable action and filing of its pleadings is necessary to constitute a lien, and that as in this case, before the commencement of such action, the judgment or debt, which is the foundation thereof, was extinguished, the relation of debtor and creditor did not exist, and the action would not lie. (*The Ocean Nat. Bk.* agt. *Olcott*, 46 N. Y., 12.)

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2. The lien of a judgment upon real estate is purely statutory, and it is within the power of the legislature to abolish this lien at any time before rights have become vested, or estates acquired under it, and to confine the remedies of the creditor to the property held by the judgment debtor at the time of the issuing of execution. A provision, therefore, causing the lien of a judgment which has not ripened into a title, to be superseded by the taking of the land under proceedings in the exercise of the right of eminent domain on payment of compensation to the owner of the land, is valid. (*Watson agt. The N. F. R. R. Co.*, 47 N. Y., 157.)

See MECHANICS' LIEN. (47 N. Y.)

LIMITED PARTNERSHIP.

See PARTNERSHIP. (4 Lansing.)

LIMITATION OF ACTIONS.

Under the provisions of the act of 1853, to provide for the incorporation of fire insurance companies (chap. 466, laws of 1853), a personal demand of the maker of a premium note, given to a mutual fire insurance company, is only made necessary where it is sought to recover a judgment for the entire note, as a penalty for neglecting to pay a partial assessment thereon. Assessments upon notes given prior to the passage of the act, were unaffected by it, and could be recovered without such demand. Where therefore, a premium note given prior to 1853, was regularly assessed to its full amount, the time of payment fixed, and notice of the assessment duly published, as required by the charter and by the laws of said company, the whole note became due and payable upon the day fixed for its payment, and after the lapse of six years therefrom, an action upon it is barred by the statute of limitations. (*Sands agt. Lillianthal*, 46 N. Y., 541.)

2. The fact that a conveyance made by an insolvent debtor is without consideration, is a controlling fact upon the question of fraud; and where the conveyance purports upon its face to be for a valuable consideration, knowledge of its existence, and that the grantor is insolvent, cannot be deemed knowledge of facts constituting fraud. Until a creditor of the insolvent learns that the conveyance was without consideration, he cannot be said to have discovered the facts constituting the fraud. Where a suit,

therefore, to set aside such a conveyance is commenced more than six years after knowledge of the conveyance and insolvency, but within six years after discovery of the fact that the conveyance was without consideration, the referee is justified in finding that the suit was commenced within six years after the discovery of the facts constituting the fraud; and such finding, if not expressly made, will be supplied by intendment in support of the judgment. (*Erickson agt. Quinn*, 47 N. Y., 410.)

3. A promissory note, payable on demand, whether with or without interest, is due forthwith, and an action thereon against the maker is barred by the statute of limitations, if not brought within six years after its date. (*Wheeler agt. Warner*, 47 N. Y., 519.)

4. Section 2 of the "Act concerning the rights and privileges of persons in the military and naval service of the United States" (chapter 578, Laws of 1864) is not retroactive; and the time of absence of a person in such service, prior to its passage, is not excluded in calculating the time limited for the commencement of an action (*Stone agt. Flower*, 47 N. Y., 566.)

5. The words "such refusal" in the short statute of limitations (2 Edmonds' Stats., p. 91, § 38) mean a refusal to allow or pay the claim, not a refusal to refer. A mere offer to refer by an executor or administrator, after an unqualified refusal to pay, will not waive the statute. But where an agreement, in writing, to refer is made, upon which both parties have acted, although no referee is chosen, the claim will be regarded as referred for the purpose of avoiding the statute of limitations. The statute is highly penal in its character, and should be strictly construed. In such a case also the principle of equitable estoppel will apply. (*National Bank of Fishkill agt. Speight*, 47 N. Y., 662.)

LIMITATIONS, STATUTE OF

1. Where a deed was executed in 1846, more than twenty years before the commencement of an action of ejectment against the grantor, and in that action the defendant, for the first time, in any action or judicial proceeding, asserted an equitable claim to have such deed reformed, and its legal effect varied, on the ground of mistake; it was held that such claim was barred by the statute of limita-

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tious. (*Cramer vgt Benton*, 60 Barb, 216.)

2. The right to demand relief, in such a case, is barred by the statute at the expiration of ten years from the time when the cause of action accrued; and the legislature, by permitting equitable defenses and counter-claims to be set up in defense to actions at law, did not intend to abrogate the statute of limitations, as to such cases. (*Id.*)

See STATUTE OF LIMITATIONS. (4. Lansing.)

LITERARY PROPERTY.

1. The common-law rights of authors, as now recognized, to their literary productions, existed at common law; and, in actions to protect those rights the state courts have jurisdiction as in other actions affecting common law rights or property interests. (*Palmer vgt Dewit*, 47 N. Y., 532.)
2. The act of congress of 1831 (section 9, chapter 116, 4th Stats at Large, 436) at most gives a cumulative remedy or choice of tribunals to persons not claiming the benefit of a copyright. (*Id.*)
2. Whether that act gives an action in respect to manuscripts not the subject of a copyright, *quere*. (*Id.*)
4. The author of a literary work or composition has, by common law, the exclusive right to the first publication of it; but he has no exclusive right to multiply copies or to control the subsequent issue of copies by others. The right to multiply copies, to the exclusion of others, is the creation of statute. (*Id.*)
6. Property in a manuscript is not distinguishable from any other personal property. It is governed by the same rules of transfer and succession, and has the benefit of all remedies, accorded to other property, as far as applicable. (*Id.*)
6. Where the character of property is impressed upon the fruits of mental labor by the law common both to this country and that of the domicile of the author, the right is equally within the protection of the law in both places. (*Id.*)
7. The courts of the state are open to an alien friend pursuing his property and seeking to recover it from a wrongdoer, and also when seeking protection for his literary productions by restraining their publication against

his wishes. An alien friend and a citizen are accorded equal protection, and are regarded with equal favor. (*Id.*)

8. An assignment of an alien author's right to the first printing and publication of a manuscript within the United States is valid, and the right is within the cognizance of a court of equity. (*Id.*)
9. The bringing out and representation upon the stage of a dramatic composition is not such a dedication of it to the public as will authorize others to print and publish it without the author's permission. The manuscript and the right of the author therein are still within the protection of the law, the same as if they had never been communicated to the public in any form. (*Id.*)

LOAN COMMISSIONERS.

1. Where lands mortgaged to the commissioners for loaning the United States deposit fund are sold by them on default of the mortgagor, it will be presumed in favor of a purchaser at the sale, against one claiming to assert a right of redemption under the mortgagor, that the steps required by the statute (laws of 1837, chap. 150), have been taken in due form by the commissioner; *a. g.*
2. That the notice required by sec. 31, when necessary, has been given at the proper time.
3. That both commissioners were present at the sale.
4. That possession was taken of the land, as provided in sec. 31. But it seems that one claiming under the mortgagor cannot object that the commissioners neglected to deprive him of possession under the statute. It is sufficient if the notice of sale required by section 31 be published once in each week for six successive weeks, prior to the sale, although the first publication is less than forty-two days prior to that time. (*Wood vgt Terry*, 4 Lansing.)

LOANS.

See EXECUTORS AND ADMINISTRATORS. (1 Lansing.)
USURY. (*Id.*)

LOCKPORT. CITY OF

1. The common council of the city of Lockport has the power, and it is its

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duty, to make and repair crosswalks in that city. Such power and duty are not left to be inferred, but are expressly given and imposed by the city charter. (*Hines vgt City of Lockport*, 60 Barb. 378.)

LOYALTY AND DISLOYALTY.

See CONTRACTS. (4 Lansing.)

M.

MALICE.

See PUBLIC OFFICER. (4 Lansing.)

MALPRACTICE.

See EVIDENCE. (47 N. Y.)
PHYSICIANS AND SURGEONS. (60 Barb.)

MANDAMUS.

1. After the term of office of a supervisor has expired, and another person has succeeded to the office, a writ of *mandamus* will not lie to compel the former to meet and account with the justices and town clerk of the town, under the provisions of the Revised Statutes (1 R. S., 349, § 4). (*The People vgt. Martin*, ante, 52.)
2. The remedy of the town is by action upon the supervisor's bond—or by action in the supreme court in the name of the town, under chap. 534, laws of 1866, to compel them to account, and for the recovery of any money or property of the town which he has not duly accounted for. (*Id.*)
3. *Mandamus*, does not lie when other legal remedies afford adequate redress. (*Id.*)
4. Where a municipal corporation (the city of Lockport) enters into a contract with an individual, for the payment to him of a specific sum of money, on a certain day, and after it becomes due they neglect or refuse to put the proper machinery in motion to raise the necessary funds, or to put the claim presented in the proper shape for liquidation and payment, within a proper time, the law gives the creditor his remedy by action, to compel payment. He is not compelled to resort to proceedings by *mandamus*. (*Buck vgt. The City of Lockport*, ante, 361.)
5. A municipal corporation does not stand in respect to such claims on the same footing with counties of the state where the only remedy of a creditor of this kind is by *mandamus*. (*Id.*)
6. The principle applicable, in such cases, to counties has never been extended to village or city corporations, existing and acting under special charter. (*Id.*)
7. Under the provision of chap. 436, of the laws of 1870, a principal who has furnished jointly with a town of the county of Suffolk, a substitute whose service constituted a part of the excess of years, for which moneys were received from the state, has a clear legal remedy by action against the town to recover his just proportion of such moneys. A *mandamus*, therefore, will not lie. (*The People ex rel. vgt. Hawkins*, 46 N. Y., 9.)
8. Upon an order to show why a peremptory writ of *mandamus* should not issue, which order contains the usual clause, "or for other relief," the supreme court has power to grant a peremptory writ of *mandamus*, for any relief to which relator is entitled, although not specified in the order. (*The People ex rel. vgt. Nostrand*, 46 N. Y., 375.)
9. Under the provisions of chap. 905, of the laws of 1869 (authorizing the construction of a highway in the towns of Jamaica and Newtown, in the county of Queens), as amended by chap. 750, of the laws of 1870, the supervisor of the town of Jamaica is required to pay over the moneys raised for the purposes of the act to the commissioners therein appointed. The position of commissioner under that act is an office, and under sec. 1, of art. 10, of the state constitution, it is vacated by the acceptance of the office of sheriff by one of the commissioners. When a person sets up a title to property by virtue of an office, and comes into court to recover it, he must be an officer *de jure*, as well as *de facto*, particularly where he acts against the express mandate of the constitution in holding the office. Under said act, where the office of one of the commissioners is thus made vacant by his acceptance of the office of sheriff, the other two commissioners have no power to act while the vacancy exists; and the fact of the vacancy is a justification to the said supervisor, in refusing to pay over the moneys collected. The granting of a writ of *mandamus*, therefore, to compel such payment is error, (*Id.*)

See CONSTITUTIONAL LAW. (4 Lansing.)
NEW YORK CITY. (*Id.*)
TOWNS. (*Id.*)

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MANUFACTURERS.

See SALE OF CHATTELS. (4 *Lansing*.)

MANUFACTURING CORPORATIONS.

See CORPORATIONS. (46 *N. Y.*)

1. The capital stock of corporations organized under the provisions of the act for the organization of manufacturing and other corporations (*chap. 40, Laws of 1818*), as amended by the act of 1853 (*chap. 333, Laws of 1853*), may be paid in in money, or in mines, manufactories and other property necessary for their business; and when fully paid in either way, and the certificate filed, the stockholders are released from personal liability. (*Doughton vgt. Hutch, 47 N. Y., 225.*)

2. But if such exemption is sought by the holders of stock originally issued for property, the transaction may be impeached for fraud; and if a creditor can show the issue of stock was fraudulent and an evasion of the law, he may recover in an action against such original stockholder, as if no payment had been made, or certificate filed. (*Id.*)

3. When all, or a portion, of the capital stock is paid in in property, the certificate required to be filed by the provisions of section 2 of the act of 1853 must state the value of the property. An agreement of the company to pay more than the value of the property is no shield to the owner of the stock issued therefor from the liability imposed by section 10 of the act of 1848. It is not necessary to allege or prove fraud. (*Id.*)

4. In an action brought by a creditor of the corporation against a stockholder whose stock was paid in property, the referee excluded evidence and refused to pass upon the question of the value of the property. *Held*, error. (*Id.*)

See CORPORATIONS. (60 *Barb.*)

5. The certificate of incorporation of a manufacturing company, filed under laws of 1818 (*chap. 40*), designated six of its stockholders as trustees for the first year, and the by-laws provided for an annual election of directors, and that no transfer of stock should be valid for any purpose, unless made in writing and entered on the books of the company, and contained no provision for filling vacancies in the office of trustees. During the first year of its incorporation, W., an acting trustee, sold his stock, some of it to the defendant, fifteen days before a transfer to

the defendant, upon the books, and while the sale to him was incomplete, and W. being still owner of the remainder of his stock, the stockholders, at a meeting held without publication of notice, at which W. was not present, passed a resolution reciting that he had sold his interest in the company, declaring his office vacant, and appointing the defendant, who was present, consented to the appointment, and thereafter acted as trustee until in December ensuing, when he left the state, to the vacancy:

Held, that the resolution of the stockholders was a mere nullity. (*Craw vgt. Easterly, 4 Lansing, 512.*)

See JUROR. (1 *Lansing*.)

MARINE COURT.

1. An action cannot be commenced in the marine court of the city of New York (nor in a justice's court) against a resident defendant, by *short attachment*. (*Harland vgt. Wehle, ante, 59.*)

See EQUITY. (47 *N. Y.*)
JURISDICTION. (*Id.*)

MARRIAGE RELATION.

See DIVORCE. (4 *Lansing*.)

MARRIED WOMEN.

See MORTGAGE. (16 *N. Y.*.)

1. The act "to conform certain ancient conveyances and directing the manner of proving deeds to be recorded," passed February 16, 1771 (2 *Van Schaick, 611*), does not recognise or affirm the rights of a *feme covert* to appoint or act by an agent or attorney, or ratify or validate deeds or grants made in her behalf by an agent or attorney. (*Hardenburgh vgt. Labin, 47 N. Y., 109.*)

2. The acts supplemental or amendatory thereto, passed March, 1773 (2 *Van Schaick, 765*), only gave effect to such deeds executed after February 16, 1771. (*Id.*)

See HUSBAND AND WIFE. (47 *N. Y.*)
TRUSTS. (*Id.*)

3. Where the debt, for which a promissory note is given by husband and wife, is the debt of the husband, the wife, in becoming a party to the note, is a mere surety for her husband. (*Todd vgt. Ames, 60 Barb. 451.*)

4. But if, in such a note, the wife charges and creates "a lien and claim" upon her separate real and personal property, to secure the payment of

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the note," the promise is binding in law, and operates to create a charge upon, and to bind, each separate estate for the payment of the debt, and the subject to its execution in satisfaction of a judgment recovered upon the promise. (*Id.*)

HUSBAND AND WIFE. (60 Barb.)

1. A married woman may maintain an action to recover for her labor or services under contract made with her therefor, without showing that she carried on business on her own account, and that out of which the claim in last arose. (*Adams vgt. Curtis, 4 Lansing, 464.*)

2. And her right to sue her husband to recover her property or collect claims and demands against him, is fully recognized by repeated decisions. (*Id.*)

THE DOWRY. (4 Lansing.)

HUSBAND AND WIFE. (*Id.*)
SEPARATE ESTATE OF MARRIED WOMEN. (*Id.*)

MASTER AND SERVANT.

1. A master is responsible *civiliter* for the wrongful act of a servant, if such act was committed in the business of the master, and within the scope of the servant's employment; and this, though in doing it, he departed from the instructions of the master. Therefore, when the employe of a railroad company (a conductor), under a misapprehension of facts, or of judgment, ejected a passenger from a car in which he was a passenger, which act was not justified by the passenger's misconduct:

Held, that the company was liable. So, where there was justifiable cause for ejection, but excessive force was used, and wantonly or maliciously. (*Higgins vgt. The W. & B. Co., 46 N. Y., 23.*)

MAXIMS.

Qui dat mille non ordit actis is a maxim of very wide, if not universal, application. It applies even to the holder of commercial paper, and more strongly to assignees of choses in action. (*HAN vgt. Eplin, 60 Barb. 319.*)

MEASURE OF DAMAGES.

DAMAGES. (46 N. Y.)
DAMAGES. (4 Lansing.)

MECHANICS' LIEN.

* The mechanic's lien law for the city

of New York (*chap. 812, Laws of 1851, as amended by chap. 404, Laws of 1855*) does not give a lien upon a public building, under a contract made by a public officer. (*Pollon vgt. Mayor, &c. 47 N. Y., 666.*)

See *ANDERSON vgt. DILLAYE (mem.) 47 N. Y., 678.*

MENACES.

1. In order to avoid an act on the ground of menace of arrest or imprisonment, it must appear that the menace was of an unlawful imprisonment, and that the party was put in fear of such imprisonment, and was induced by such fear to do the act in question. (*Knapp vgt. Hyde, 60 Barb. 80.*)

2. It is not such menace as will avoid an act, if the party is only menaced by a lawful imprisonment. (*Id.*)

See *PROMISSORY NOTES. (60 Barb.)*

MESNE PROFITS.

See *USE AND OCCUPATION. (60 Barb.)*

MINISTER AND PEOPLE.

See *CONTRACT. (4 Lansing.)*
RELIGIOUS CORPORATIONS. (Id.)

MINISTERIAL ACT.

See *JUDGMENT. (4 Lansing.)*

MINOR CHILD.

See *PARENT AND CHILD. (4 Lansing.)*

MISDEMEANOR.

See *HIGHWAYS AND STREETS. (4 Lansing.)*
PENALTY. (Id.)

MISJOINDER.

See *BRIDGES. (4 Lansing.)*
PRACTICE. (Id.)

MISTAKE.

1. Where money is paid under a mistake of fact, negligence in making the mistake does not prevent the party paying from recovering it back, if the other party has not been prejudiced. (*Duncas vgt. Berlin, 46 N. Y., 685.*)

2. A court of equity cannot grant relief upon the sole ground of a mistake of

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law. (*Jacob v. Mortgage, 47 N. Y., 37.*)

2. Defendant obtained judgment against plaintiff in the marine court of the city of New York. Plaintiff carried it for review to the court of common pleas of that city, where judgment was reversed. Subsequently, the court of appeals decided that the common pleas had no jurisdiction of a case from the marine court, until it had been first heard and decided by the general term of that court. Plaintiff thereupon instituted this action in equity, and obtained a judgment granting a perpetual stay of defendant's proceedings, on the ground that the judgment in the marine court was erroneous and that the parties had acted under a mutual mistake of law, in the reviews in the common pleas.

Held, error.

See MISTAKE. (60 Barb.)

MISTAKE OF FACT AND LAW.

1. Mistake of a material fact by one of the parties to a contract renders it voidable in equity, and an action lies for its rescission. (*Smith v. Mackin, 4 Lansing, 41.*)

2. But it cannot, in general, be reformed, as in such case there is no mutual agreement. (*Id.*)

3. Parties must be held to have comprehended the legal effect of the instrument they have executed, a mere misconception of the law, as an abstract proposition, not entering as an ingredient into the transaction, is not sufficient to confer a power of revocation, or to entitle the party who claims to be aggrieved to relief. (*Fellows v. Meermans, 4 Lansing, 230.*)

See DEFENSES. (4 Lansing.)

MISTRIAL.

See CRIMINAL LAW. (60 Barb.)

MONEY RECEIVED.

See ARREST. (4 Lansing.)

MONUMENTS.

See DEEDS. (46 N. Y.)

MORTGAGE.

1. Where the real estate of a wife is mortgaged to secure the debt of her

husband, she occupies the position of a surety, and she, and those claiming under her, are entitled to the benefit of the rules, prohibiting the dealing of the creditor with the principal debtor, to the prejudice of the surety. An extension of the time of payment, without her assent, is such a dealing, and discharges the mortgage. (*Bank of Albany v. Burns, 46 N. Y., 170.*)

2. Whether it can be shown by extrinsic evidence or verbal agreement, that such a mortgage, conditioned for the payment of a sum certain, within a specified time, was in fact, given as a continuing guarantee for any and all indebtedness to the amount secured, *quære*. At least, such effect cannot be given to the security, without competent proof of the assent of the mortgagor. (*Id.*)

3. The fact that the mortgagee had no actual knowledge of the fact that the wife owned the mortgaged premises, and of the resulting relationship of principal and surety between the husband and wife, is not material where the title is on record. He is chargeable with knowledge. (*Id.*)

4. H. had negotiated with S. for the purchase of certain real estate; not being able to complete the purchase, he induced the defendant G. to become the purchaser. At the time of the purchase, defendant G. stated, that if H. would make certain payments, at a specified time, she would convey the property to him:

Held, that the transaction was an absolute purchase by defendant G., and a pure conditional agreement of sale, and not a mortgage; and that H. was not entitled to redeem. (*Still v. Grant, 46 N. Y., 496.*)

5. E. W. S. being seized of certain premises, conveyed them to B., in trust, to receive the rents, issues and profits for the use and benefit of L. C. S., wife of the grantor, the same to be appropriated according to her directions, and upon her death, in case the husband survived, the same to be conveyed to her children or descendants, if any survive her, if none, then to him, and in further trust to sell or mortgage the premises conveyed, or any part thereof, whenever desired by the wife, "separate and apart from her husband," and pay over the proceeds to her or reinvest the same according to her directions. B. joined in the deed and accepted the trusts: the wife did not join. Subsequently husband and wife joined in a mortgage of the prem-

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ses in the ordinary form to plaintiff, to secure a precedent debt of the husband. L. C. S. survived her husband. In an action brought to foreclose the mortgage:

Held. 1st. That the trust was valid and the deed vested the whole estate in the trustee, subject to the execution of the trust and to the wife's contingent right of dower, that the power of sale was irrevocable by the grantor, who had, at the time of the execution of the mortgage, no estate, legal or equitable, in the premises capable of being transferred.

2d. That the wife's inchoate right of dower, was incapable of being transferred or released by her during coverture, except to one who already had or who by the same instrument received an independent interest in the estate, nor could she bind her self personally by a covenant or contract affecting her dower right. She was not estopped, therefore, by any such covenant from setting up a subsequently acquired title, and the plaintiff took no interest under his mortgage. (*Morris vgt. Smith*, 46 N. Y., 571.)

3. The rule that a deed absolute upon its face can, in equity, be shown by parol or other extrinsic evidence, to have been intended as a mortgage has been, upon the fullest consideration, deliberately established in this state, and will not be departed from. (*Horn vgt. Kellogg*, 46 N. Y., 605.)

7. A. S. entered into a written contract with the owner for the purchase of a parcel of land and under it went into possession. Not being able to pay the purchase money at the time fixed by the contract, he made a parol agreement with defendant, by which the latter agreed to and did pay a portion of the purchase-price, took the title and gave his bond, secured by a mortgage upon the land, out of the avails of which the balance was paid. It was agreed that defendant was to hold the title as security for the money advanced, the liability incurred and certain other claims against A. S. A. S. continued in possession for two years. Defendant then entered into possession, no portion of the money advanced or secured having been paid him:

Held. that by the contract with the vendor, A. S. became invested with the equitable title to the land, which interest was capable of being mortgaged; and that under the agreement with defendant the latter took and held the title as mortgagee, subject to the right of A. S. to redeem. (*Stoddard vgt. Whiting*, 46 N. Y., 627.)

8. A stipulation in a mortgage, whereby the mortgagee assumes and agrees to pay a prior mortgage on the premises, does not impose upon the mortgagee a personal liability for the prior mortgage debt which can be enforced against him by the prior mortgagee. (*Garney vgt. Rogers*, 47 N. Y., 233.)

9. The same rule applies to a deed absolute on its face, but, in fact, intended as a mortgage. (*Id.*)

10. The stipulation in such cases is not a promise made by the mortgagee to the mortgagor, for the benefit of the prior mortgagee, but is a promise for the benefit of the mortgagor only; it is to protect his property by advancing money to pay his debt. The cases of *Harr vgt. Bee* (24 N. Y., 178), and *Lawrence vgt. Fox* (20 N. Y., 365) distinguished. (*Id.*)

11. In this respect it differs from a similar stipulation contained in an absolute conveyance. (*Id.*)

See ASSIGNMENT. (47 N. Y.)
CHATTEL MORTGAGE. (*Id.*)
FORECLOSURE. (*Id.*)
RECORDS. (*Id.*)

11. A mortgage, given for a larger sum than is due to the mortgagee, is valid for the excess only in case no rights of third persons have intervened. (*Dissell vgt. Kellogg*, 60 Barb., 617.)

12. As against a subsequent *bona fide* mortgagee, such a mortgage can only be a valid security for the amount due thereon at the time his rights as subsequent mortgagee accrued. (*Id.*)

13. The foreclosure by advertisement of a mortgage tainted with usury will not operate to convey a good title, except to a *bona fide* purchaser at the advertised sale. And this can be prevented by giving notice of the usurious character of the mortgage, at the time of the sale. (*Id.*)

See AGREEMENT. (60 Barb.)
COMPLAINT. (*Id.*)
FORECLOSURE SUIT. (*Id.*)
LANDLORD AND TENANT. (*Id.*)

MORTGAGE OF CEMETERY LOT.

See FORECLOSURE. (4 Lansing.)

MORTGAGE FORECLOSURE.

1. The wife of the grantee of mortgaged premises must be served with notice and made a party to the proceedings to foreclose the mortgage by advertisement under the statute, in order to cut

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off her inchoate right of dower. (*Northrop* agt. *Wheeler*, ante, 122.)

See FORECLOSURE. (4 *Lansing*.)

MORTGAGE OF PERSONAL PROPERTY.

See CHATTEL MORTGAGE. (4 *Lansing*.)

MORTGAGE OF REAL ESTATE.

1. Where the plaintiff took a deed from the owner of premises, under parol agreement with one C that a purchase should be made, and a part of the purchase money advanced by him for the benefit of C, who paid the balance; that the plaintiff should hold the title as security for repayment to him of the sum advanced for purchase-money, taxes, &c., and on repayment of such advances, the premises should be conveyed to C, or his wife.—*Held* (TALCOTT, J., dissenting), that the plaintiff was a mere mortgagee of the land, and could not maintain ejectment for it against the defendant, C's widow. (*Carr* agt. *Carr*, 4 *Lansing*, 314.)

2. It seems, if the relationship between the parties to the agreement was that of trustee and cestuique trust, ejectment did not lie against the defendant, who was not shown to be in default. (*Id.*)

See DOWER. (4 *Lansing*.)
EXECUTORS AND ADMINISTRATORS. (*Id.*)
FORECLOSURE. (*Id.*)
LOAN COMMISSIONERS. (*Id.*)
USURY. (*Id.*)

MORTGAGOR AND MORTGAGEE OF CHATTELS.

See CHATTEL MORTGAGE. (4 *Lansing*.)

MOTIONS AND ORDERS.

1. Upon an application to remove a cause to the circuit court of the United States, under the provisions of the act of congress of 1789, it is necessary for defendant to show as well that the suit was commenced "by a citizen of the state in which the suit is brought," as that it was commenced "against a citizen of another state." A petition therefore stating that plaintiff "is a citizen," is insufficient. No legal presumption arises from it that he was a citizen at the time of the commencement of the action. (*Holden* agt. *Putnam Fire Ins. Co.*, 46 *N. Y.*, 1.)

2. Religious corporations have no com-

mon law rights to alienate their real estate, and to constitute a sale within the meaning of section 11, there must be a valuable consideration accruing to the corporation as such. Therefore, an order of the supreme court, authorizing a conveyance founded upon a petition, showing the only consideration for the contemplated transfer to be a benefit to the individual corporation, is without jurisdiction and a deed executed in pursuance thereof is void. (*The M. A. Baptist Church* agt. *The Baptist Church in O. Street*, 46 *N. Y.*, 131.)

3. An order made at general term reversing a judgment absolutely, without granting a new trial, cannot be appealed from as an order. To review it, judgment should be perfected thereon, and an appeal taken from the judgment. The order alone is not a judgment. (*Mohl* agt. *Vonderwalke*, 46 *N. Y.*, 539.)

4. A motion can be made at special term for a new trial upon the ground that the verdict is against the weight of evidence, or of surprise, or of newly discovered evidence, or of misconduct of the jury, or other ground after the entry of judgment on the verdict. (*Tracy* agt. *Allmyer*, 46 *N. Y.*, 598.)

See APPEAL. (46 *N. Y.*)

5. A party aggrieved by an order made by a judge out of court is not confined to the remedy by appeal; he has the right to move to set it aside. (*West Side Bank* agt. *Pagday*, 47 *N. Y.*, 368.)

6. Where proceedings are instituted, under section 294 of the Code, to reach a debt claimed to be due the judgment debtor, if the debt is denied, a judge has no authority to decide summarily the question of the indebtedness, and to compel its payment. The debt is only recoverable, as provided in section 299, in an action against the person or corporation claimed to be owing it, brought by a receiver. (*Id.*)

7. By the provisions of section 297, which authorizes a judge to order any property of the judgment debtor due to him to be applied to the satisfaction of the judgment, and by section 302, which provides that a person disobeying an order of a judge may be punished as for contempt, it was not intended to revive the remedy of imprisonment for debt, and under them a judge has no authority to direct the imprisonment of one owing a debt to

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a judgment debtor, and who is unable or declines to pay. (*Id.*)

3. The word "property," as used in section 297, does not include debts, but is limited to goods or specific money; and, when these belong indisputably to the judgment debtor, a refusal to deliver them over, as ordered, would be a willful contempt, and punishable as such. (*Id.*)

4. Where the court has acquired jurisdiction of the subject-matter of an action or proceeding, it has jurisdiction to render judgment, and if error is committed, the judgment is voidable, not void, and the remedy of the party aggrieved is by appeal. It is only where a judgment is void that a party has an absolute legal right to have it set aside or vacated upon motion. (*Schaettler*, *agt. Gardner*, 41 N. Y., 404.)

10. It is only in actions tried by the court or a referee, that the order granting a new trial can declare the grounds upon which the new trial was granted, and whether granted upon questions of law alone or upon questions of fact as such. (*Dickson*, *agt. B. and Seventh Av. R. R. Co.*, 41 N. Y., 507.)

11. An appeal from an order or decree of a surrogate, without filing a bond as security for respondent's costs, as required by section 108, title 3, chapter 9, part 3 of the Revised Statutes (2 R. S. 610), is ineffectual for any purpose, and after the expiration of time limited for appeal it is not in the power of the court to grant any relief. (*In re Dumassil*, 41 N. Y., 677.)

12. Upon motion to dismiss such an appeal, the court has no power to annex any conditions to the dismissal. (*Id.*)

See APPEALS. (41 N. Y.)
CONTEMPT. (*Id.*)
INDIGENT PERSONS. (*Id.*)
PRACTICE. (*Id.*)
BAIL. (4 *Lanning*.)
ORDER OF COURT. (*Id.*)

MUNICIPAL BONDS.

See RAILROAD MUNICIPAL BONDS. (4 *Lanning*.)

MUNICIPAL CORPORATIONS.

4. Where a municipal corporation (the city of Lockport) enters into a contract with an individual, for the payment to him of a specific sum of money, on a certain day, and after it becomes due

they neglect or refuse to put the proper machinery in motion to raise the necessary funds, or to put the claim presented in the proper shape for liquidation and payment, within a proper time, the law gives the creditor his remedy by action, to compel payment. He is not compelled to resort to proceedings by mandamus. (*Back*, *agt. The City of Lockport*, ante, 361.)

5. A municipal corporation does not stand in respect to such claims on the same footing with counties of the state where the only remedy of a creditor of this kind is by mandamus. (*Id.*)

6. The principle applicable, in such cases, to counties has never been extended to village or city corporations, existing and acting under special charter. (*Id.*)

4. A defective and dangerous cross-wall in a street in the city of Lockport, whereby a citizen sustained personal injuries, was presumptively a construction by the city. But if it was not, it was an obstruction in a public highway, the duty to keep which in proper and safe condition devolved upon the city. (*Walker*, *agt. The City of Lockport*, ante, 366.)

5. Express notice of the dangerous condition of a cross-wall or a street is no necessary to be given to the city authorities, where ample time has elapsed to render the condition notorious. (*Id.*)

6. Under the charter of the city of Lockport, an objection to an assessment for the repair of a sewer, which extended the repair a distance of sixty feet beyond which the ordinance directed, held, not sustainable: (*Webster*, *agt. The City of Lockport*, ante, 368.)

7. Held, also, that the objection that the work could not be done except by contract, and after receiving proposals, was not well taken: (*Id.*)

8. Held, also that the objection that the work could not be done until after an assessment for its cost was unavailable (*Id.*)

9. Held, also that the objection that the territory benefited, &c., was not sufficiently described in the ordinance, was untenable: (*Id.*)

10. Held, also that the objection that the principle on which the assessment was made was wrong and unjust, was unavailable: (*Id.*)

11. Held, that the objection that a large amount of property stated in the return to be of the value of \$24,000, was not assessed at all, for the reason that

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it was doubtful whether it could be assessed—being mostly, school, church and city property, was fatal to the assessment: (*Id.*)

12. *Held*, also that the objection that in many cases the parcels of real estate attempted to be assessed, were so imperfectly described that they could not be sufficiently identified, was also fatal to the assessment. (*Id.*)

See New York City. (46 N. Y.)

13. Where power is delegated by the legislature to the common council of a city, to authorize the laying of railroad tracks along or across any of its streets, subject to the same claims and compensation for damages to the owners or lessees of adjoining property which is allowed under the general railroad laws, the common council has power to authorize the laying of a branch track from a private elevator across such streets to the track of a railroad, to be run by the railroad company for the transportation of grain, &c., to and from the elevator. It is not requisite that the ordinance giving the authority should provide for compensation, as that is provided for in the act. (*Clarke* *vs.* *Blackmar*, 47 N. Y., 150.)

14. The authorities of a city are not bound to be experts or skilled in mechanics and architecture, and can only be held to the extent of reasonable intelligence, and ordinary care and prudence. (*Hume* *vs.* *Mayor, &c.*, of N. Y., 47 N. Y., 639.)

15. A municipal corporation is not liable for injuries caused to individuals by obstructions on the highway not placed there by its own officials, or by authority of the city government, until after actual notice of their existence, or until by reason of the lapse of time it should have had knowledge, and therefore actual notice may be presumed. (*Id.*)

16. Plaintiff was injured by the fall of a wooden awning over a sidewalk upon one of defendants' streets. The awning was constructed in the usual manner, by competent mechanics, with slaters of proper form and size. Four months prior to the accident the awning had been injured by a fire engine running against it. It was repaired by a competent mechanic, who did what he supposed necessary to make it safe. A day or two before the accident there had been an unusually heavy fall of snow, and a heavy body of it remained upon the awning. That part of the awning which had been repaired gave

way. Defendants requested the court to submit to the jury in substance the question whether the fall of the awning was not occasioned by a secret defect, not discoverable, resulting from the injury to it, and by the unusual quantity of snow upon it, and to charge, if the jury so found, defendants were entitled to a verdict. This the judge declined to do.

Held, error; that whatever may be the extent and measure of the liabilities of the city government, these were questions of fact which should have been submitted to the jury. (*Id.*)

17. When the common council of a city, or the trustees of a village, are made commissioners of highways, the duty to repair the street becomes imperative; unless they not only have not funds applicable to that use, but have not by the charter power to raise them. (*Fines* *vs.* *The City of Lockport*, 60 Barb., 378.)

See *SUPREMACY*. (4 *Leading*.)

MURDER.

See *EVIDENCE*. (4 *Leading*.)

N.

NATIONAL BANKS.

1. Whether, when a State bank has become a national bank, under section 44 of the act of congress of June 3d, 1864, the liabilities of the pre-existing bank follow and attach upon the national bank.—*Quere.* (*Booth* *vs.* *Farmer and Mechanics' Nat. Bank*, 4 *Leading*, 301.)

NAVIGATION.

1. A sailing vessel navigating a river, unless special circumstances exist making it dangerous, is entitled to take advantage of a favorable tide as well as of a wind; and in a temporary calm, or when the wind is baffling to keep in condition, to profit by any breeze which may spring up. Under such circumstances, it is not required to anchor or take other measures to avoid collision with an approaching steamer. The steamer should calculate the course of the drifting vessel, by noting the course of the current, and should avoid it. (*Parrott* *vs.* *K. and N. Y. Ice Cos.*, 40 N. Y., 361.)

2. When a vessel, having boats in tow

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In the harbor of New York, has the usual lights for tug-boats, generally known and recognized as such, they are notice to the masters and pilots of other vessels that the vessel carrying and exhibiting them is used as a tug boat, and is liable to have boats in tow, although such lights are not the ones prescribed by the act of congress for vessels of that character and so employed; and the fact they are not the lights required by law does not excuse other craft from the exercise of proper care in approaching or passing her. (*Hoffman* agt. *Union Ferry Co.*, 47 N. Y., 176.)

2. Even if such a vessel were without signals of any kind, and had negligently or recklessly undertaken to navigate the harbor under circumstances in which she should have come to anchor, it is the duty of other craft, on discovering her situation and the danger of a collision, to use all the usual and proper means to avert the danger. When two vessels come in sight of each other, both are bound to accept the situation and to do what is necessary and can be done, with safety, to prevent injury from collision; and if the one does all that could have been done, and the other omits to do what prudent and discreet navigators would have done, and which, if done, would have prevented a collision, the latter is chargeable with the consequences, if injury happens. The fact that an injured vessel is proceeding at the time of the injury, without the proper cautionary signals, may raise a presumption that the collision resulted from the want of them, but when evidence is given tending to prove that it resulted solely from other causes, it becomes a question of fact for a jury. (*Id.*)

See FEDERAL COURTS. (4 *Lansing*.)

NE EXEAT.

1. The right to the writ of *ne exeat*, in equitable cases, has not been in any way abolished by the Code. (*Beckwith v. Smith*, 4 *Lansing*, 182.)

NEGLIGENCE.

1. In an action against a railroad company for causing death from negligence, it appeared from the plaintiff's testimony, that the day was very stormy—wind high, blowing hard and snow falling very fast, which made it difficult to see a train of cars at the place where the highway crossed the railroad, more than six or eight rods dis-

tant; that just before the deceased attempted to cross the track with his horses and wagon, a carman with a load crossed the track, and there were other teams approaching the track behind that of the deceased. (*Hackford* agt. *N. Y. Cent. & Hudson R. R. Co.*, ante, 222.)

2. The drivers of other teams stopped, seeing the approaching engine, and cried "whoa" to the deceased just before he got on the track; the deceased did not regard it but drove on and was instantly struck and killed. (*Id.*)
3. The witnesses testified that as the engine was approaching the track the bell was not rung nor was the whistle blown; the train was running at the speed of about 20 miles an hour, and there was no sign indicating the crossing. The railroad track was higher than the land on either side, and higher than the highway. Near the crossing (in fair weather) a train could be seen for a distance of 1400 feet in one direction, and an eighth of a mile in the other. (*Id.*)
4. The plaintiff was *non est* at the circuit, on the ground that the deceased was himself guilty of negligence:

Held, by the general term, on appeal, that the court committed an error in refusing to submit the question of concurring negligence of the deceased to the jury. Had the day been a fair one so that there was nothing to prevent a person from seeing and hearing an approaching train, the deceased would have been chargeable with the grossest negligence. (*Id.*)

5. On a trial of this kind, the plaintiff is not bound to disprove affirmatively his own negligence. But where on the trial there is evidence of negligence on the part of the plaintiff, whether it comes from plaintiff's or defendant's witnesses, the plaintiff must overcome it, in order to entitle himself to recover. In this way, and in this way only, is the plaintiff bound to disprove his own negligence. (*Id.*)
6. The mere agreement of a landlord to repair, has reference only to the condition of the building or premises demised for the purpose of their profitable use, and the pecuniary benefit to be derived from their enjoyment or loss from being deprived of their use in such state of repair as the agreement intended. (*Flynn* agt. *Hutton*, ante, 333.)
7. Such a simple agreement or covenant, in no way contemplates any destruction of life or casualties to the person

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or property of any one, which might accidentally result from an omission to fulfil the agreement in every respect. (*Id.*)

2. For the proposition that a landlord under contract (generally) to keep the premises in repair is for a breach thereof, also further liable to his tenant, as in tort, for wilful refusal or neglect to perform his obligation, no warrant is to be found in principle or authority. (*Id.*)

3. His subsequent parol promise, after being notified of defects, to make necessary repairs, unless founded on a new consideration, superadds nothing to his original obligation, and furnishes no ground for awarding additional damages, except so far as the tenant is by such promise delayed and limited in making them (primarily) at his own expense. (*Id.*)

10. A claim cannot exist on the part and behalf of sufferers from defects to a piazza appurtenant to a tenement house, occurring from natural causes—from natural wear and tear, in an action for a tort or negligence against the landlord, whose only obligation exists in contract with the tenant in possession, and one can only be founded on some other negligence, trespass or wilful breach of a direct public or private duty to the party injured. (*Id.*)

11. In this case, *held*, that the negligence of the parents, in suffering the plaintiff, a child about three years of age, to wander upon this dilapidated piazza or balcony, and exposing it to danger and the injuries it received was so gross and unambiguous as to constitute contributory negligence and should prevent a recovery by the plaintiff for damages for such injuries. (*Id.*)

12. When the duty is imposed by law upon a public officer or municipal corporation, of keeping a structure in repair, it involves the exercise of a reasonable degree of watchfulness, in ascertaining the condition of such structure from time to time; and where this is omitted, such officer or corporation is liable for damages, resulting from a dilapidation of the structure, which is an ordinary result of its use, and which would have been disclosed by an examination. No notice of the defect is necessary in such a case to fix the liability. (*McCarthy* *vs.* *The City of Syracuse*, 46 N. Y., 184.)

See COMMON CARRIER. (46 N. Y.)

13. Plaintiff, an infant twelve years of age, traveling with his mother upon

the defendant's cars, being unable to find a seat in the car with her, by her permission went into another, and there remained until the train reached a station; when in the effort to leave the car and return to his mother, he received an injury.

Held, it was not *per se* a negligent act on the part of the mother to permit him to go from one car to another, under the circumstances. (*Dones* *vs.* *The N. Y. C. & H. Co.*, 47 N. Y., 81.)

14. In an action against a repair contractor upon the canal for damages to a boat, caused by the giving way of the gates of a lock upon his section, which he had neglected to keep in repair, as required by his contract:

Held, that it was not contributory negligence upon the part of the captain of the boat that he made the attempt to pass the lock, knowing that the gates were in a dilapidated condition. As a common carrier it was his duty to make all reasonable exertions to deliver the freight intrusted to him, and to proceed for this purpose as long as there was a reasonable prospect that he could do so with safety, although some danger was incurred. In order to charge him with negligence, when the defect occasioning the injury was not sudden and unexpected, but known to and within the control of the contractor, it must be made to appear the defendant had so far violated his contract that it was imprudent to attempt such navigation at all, by reason of the obvious dangers to be encountered. (*Johnson* *vs.* *Belden*, 47 N. Y., 130.)

15. In an action to recover damages for causing the death of a child three years old, it appeared that the child killed was sent across defendant's track unattended save by a child nine and one-half years old.

Held, that this was not *per se* such negligence as would defeat a recovery. (*Ihl* *vs.* *The 4th St and G. St. F. & E. Co.*, 47 N. Y., 317.)

16. If the deceased child exercised due care and the injury was caused solely by the negligence of defendant's driver, the defendant was liable, without regard to the question whether it was negligence in the parents to let the child go with so young an attendant. (*Id.*)

17. Nor would negligence upon the part of so young a child as the deceased, when there was no negligence upon the part of the parents or the attend-

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ant, absolve the defendant from liability. (*Id.*)

18. A traveler upon the highway, in approaching a railroad crossing, is required to make a vigilant use of his eyes and ears, to ascertain if there is an approaching train; and if by such use of these faculties, while approaching, the vicinity of such a train may be discovered in time to avoid a collision, the omission to exercise them is such contributory negligence as will bar a recovery for an injury sustained by a collision. (*Davis* *vs.* *N. Y. C. and H. R. R. Co.*, 47 N. Y., 400.)

19. This rule does not require the traveler to stop, or, if he is with a team, to get out and leave his vehicle and go to the track, or to stand up and go upon the track in that position, in order to obtain a better view. (*Id.*)

See BANKS AND BANKING. (47 N. Y.)
COMMON CARRIER. (*Id.*)
MUNICIPAL CORPORATIONS. (*Id.*)
NAVIGATION. (*Id.*)
TITLE. (*Id.*)
MADDER *vs.* *N. Y. C. and H. R. R. Co.* (mem.) (*Id.*)

20. Proof of driving in a public street, in a city, at the rate of a mile in three minutes and ten seconds, when the law limits driving to a mile in eleven minutes, is amply sufficient to charge the driver with the consequences that follow from such driving. (*Moody* *vs.* *Osgood*, 90 Barb. 644.)

See HAILMENT. (60 Barb.)
LOCKPORT (CITY OF.) (*Id.*)
MUNICIPAL CORPORATIONS. (*Id.*)
PHYSICIANS AND SURGEONS. (*Id.*)
RAILROAD COMPANIES. (*Id.*)

21. Where a sheriff is guilty of negligence in allowing an escape through entire failure to execute a writ of *seizet*, an action lies against him without application to the court. (*Id.*)

See CONTRACT. (4 Lansing.)
NECKEAT. (*Id.*)
PRINCIPAL AND SURETY. (*Id.*)
SALE OF CHATTELS. (*Id.*)

NEGOTIABLE PAPER.

See GENERAL ISSUE. (60 Barb.)
PROMISSORY NOTES. (*Id.*)
DONATIUS CAURA MORTIS. (4 Lansing.)

NEW TRIAL.

1. A motion for a new trial on the ground of newly discovered evidence, may be

made and granted *after judgment final* entered in the action. (*Blaphelsky* *vs.* *Lynch*, ante, 157.)

2. Such a motion will be granted, where it appears from the papers filed on the motion that the newly discovered evidence is material to the issue; that it goes to the merits of the action; that it is not cumulative; that it overthrows the plaintiff's claim upon which he recovered, and shows the suit to be a conspiracy, conceived in fraud and maintained by perjury. And that the evidence was not discovered until after the trial. (*Id.*)

3. A motion can be made at special term for a new trial upon the ground that the verdict is against the weight of evidence, or of surprise, or newly discovered evidence, or misconduct of the jury, or other ground after the entry of judgment on the verdict. (*Tracy* *vs.* *Almyer*, 46 N. Y., 593.)

See APPEALS. (46 N. Y.)

4. When a new trial has been granted in an action tried by a jury upon a record presenting questions of law only, and the record presents no question or exception upon which the order could be sustained in this court, except such as, if decided adversely to the party complaining, would be conclusive against him, so that in no aspect could his case be varied or put in better form upon a retrial, an appeal to this court is proper and advisable, but not otherwise. (*Dickson* *vs.* *B.* and *7th Av. R. R. Co.*, 47 N. Y., 507.)

5. Where the court below may have granted a new trial upon questions of fact, the decision is not reviewable in this court. (*Id.*)

6. It is only in actions tried by the court or a referee that the order granting a new trial can declare the grounds upon which the new trial was granted, and whether granted upon questions of law alone or upon questions of fact as such. (*Id.*)

NEW YORK CITY.

1. The provision of sec. 7 of the charter of the city of New York of 1857 (section laws of 1857, chap. 446, sec. 7), prohibiting the passing of or the adoption of, certain resolutions by the common council, until two days after the publication thereof, in all the newspapers employed by the corporation, is mandatory; and an ordinance or resolution, not so published, is void.

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- and an assessment in pursuance thereof is invalid. (*In re Douglas*, 46 N. Y., 42.)
2. A resolution of the common council of the city of New York, directed that certain streets be paved with Nicolson pavement, and "that cross walks be laid or relaid at intersecting streets, under the directions of the Croton aqueduct department."
- Held*, that said resolution did not require a cross walk at every street intersection; but that the department could omit such as it deemed unnecessary or improper. (*In re Eager et al.*, 46 N. Y., 100.)
3. An error of judgment upon the part of the commissioners apportioning the sum assessed, cannot be reviewed in proceedings instituted under chap. 383 of the laws of 1838; that can only be resorted to for the purpose of reviewing frauds or irregularities. (*Id.*)
4. The provision of sec. 27, chap. 383 of the laws of 1870, authorizing a deduction from an assessment of the sum erroneously included, is not retroactive, and does not affect proceedings had before the passage of the act. (*Id.*)
5. The act of April 12th, 1865 (chap. 281, laws of 1865) prohibiting the construction of a sewer in the city of New York, unless in accordance with a general plan, applies to cases where proposals had been advertised for and bids opened before the passage of the act. (*In re P. E. Public School*, 46 N. Y., 178.)
6. The power of the legislature to regulate the construction of such public works, cannot be foreclosed by any contract of a municipal corporation. (*Id.*)
7. The provision of sec. 178, of the "act to reduce several laws relating particularly to the city of New York into one act" (revised laws of 1813, chap. 86, Davies' laws of New York, 531), which declares that upon the confirmation of the report of the commissioners of estimate and assessment, the mayor, &c., shall be seized in fee of the lands required for the opening or widening of streets, and the provision of sec. 181 of the same act, which declares all leases of lands thus taken void after such confirmation, was modified by the provisions of chap. 210, laws of 1818, which authorizes the city to suspend the opening, &c., of any street for a period not exceeding fifteen months, that the title of the city does not become absolute until the corporation takes possession, or until the time fixed for the suspension of the work, or the fifteen months expires, and until the title of the owner is thus fully divested, he can recover for the use and occupation of the premises. Under the construction thus given, these statutes are constitutional, at least, the owner has the right to waive the constitutional objection, and accept the use of the premises, as a compensation for the postponement of the payment of the amount awarded to him, and no one else can complain. (*Detmold v. Drake*, 46 N. Y., 318.)
8. Under the provisions of the act in relation to sewerage and drainage in the city of New York (laws of 1865, chap. 381), the devising of a plan for the drainage of the entire city is not a condition precedent to the power of contracting for the doing of the work in any of the sewerage districts. (*In re N. Y. P. E. Public School*, 47 N. Y., 546.)
9. The provision of sec. 4 of said act, requiring the Croton aqueduct board to file a copy of the map showing the plan of drainage of the sewerage districts with the clerk of the common council, in the absence of any provision prohibiting the contracting of the work until the filing of such copy, is directory only, and the omission so to do does not vitiate the assessment. (*Id.*)
10. The mechanics' lien law for the city of New York (chap. 513, laws of 1851, as amended by chap. 401, laws of 1855), does not give a lien upon a public building, under a contract made by a public officer. (*Prillax v. Mayor*, &c., 47 N. Y., 666.)
- See MUNICIPAL CORPORATIONS. (47 N. Y.)
- See ASSESSMENTS. (60 Barb.)
- See INJUNCTION. (*Id.*)
11. The statute (2 R. S., 418) which regulates street openings in New York, provides that the mayor, &c., shall pay, within a time named after confirmation of the report of commissioners, to the person in whose favor any sum shall be estimated and reported, the said sum, or after application therefor, be liable to suits for recovery thereof by those entitled, and also provides that when the names of the owners of lands taken shall not be set forth or mentioned in the report, it shall be lawful for the mayor, &c., to pay the sums reported into court.—*Held*, that no action would lie against the city for recovery of sums awarded

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to unknown owners by the commission's report, but a mandamus would issue to compel their payment into court. (*Fisher vgt. Mayor of N. Y.* 4 *Lansing*. 451.)

See COMMISSIONERS OF ESTIMATE AND APPRAISEMENT IN NEW YORK CITY. (4 *Lansing*.)

NONSUIT.

See EVIDENCE. (4 *Lansing*.)

NON-USER OF CORPORATE POWERS.

See ACTION. (4 *Lansing*.)

NORMAL SCHOOLS.

See CONSTITUTIONAL LAW. (47 *N. Y.*)

NOTARIES PUBLIC.

See BANKS AND BANKING. (47 *N. Y.*)

NOTES AND BILLS.

1. A simple indorsement of the principal's name upon a promissory note, made by an agent having authority, binds the principal as indorser. (*First National Bank of Canandaigua vgt. Whitney*, 4 *Lansing*. 34.)

2. The bona fide holders of a note recovered judgment upon it against the maker and indorsers, which they assigned to their immediate indorser.—*Held*, that the latter held the judgments subjects to the rights of the maker, against the note while in his hands, and that he (the indorser), having received the note in payment of a precedent debt, through the fraud of his debtors upon the maker, equity would relieve the maker from an enforcement of the judgment against him by the assignee. (*Coleman vgt. Lansing*, 4 *Lansing*. 70.)

See DONATIO CAUSA MORTIS. (4 *Lansing*.)

INSURANCE. (*Id.*)

PRINCIPAL AND SURETY. (*Id.*)

NOTICE.

See CONSTRUCTIVE NOTICE. (46 *N. Y.*)

NEGLECTANCE. (*Id.*)

STOCK BROKERS. (*Id.*)

CONSTRUCTIVE NOTICE (47 *N. Y.*)

TITLE. (*Id.*)

RAILROAD COMPANY. (4 *Lansing*.)

SALE OF CHATTELS. (*Id.*)

ORDER OF COURT. (*Id.*)

NOTICE OF MORTGAGE SALE.

See CHATTEL MORTGAGE. (4 *Lansing*.)
LOAN COMMISSIONERS. (*Id.*)

NOTICE OF TRIAL.

1. Where a defendant has regularly noticed a cause for trial, but through mistake has omitted to file a note of issue with the clerk to have it put upon the calendar, the court on motion has the discretion, under the Code, to allow such note of issue to be filed with the clerk and the cause placed upon the calendar. But such motion will not be allowed to be made later than the first day of the circuit. (*Clapton vgt. Myers*, ante, 95.)

NUISANCE.

1. No citizen has the right to remove any obstruction on the public street or highway, because such obstruction is a public nuisance. No such right exists in any person, except, one who, apart from the injury which he, as one of the public, sustains in common with his fellow citizens, is especially inconvenienced by the obstruction on the street. (*Goldsmith vgt. Jones*, ante, 415.)

2. Where the plaintiffs caused to be erected without any permission in front of defendant's store on Broadway, N. Y., a triangular box seven feet high, and projecting about two feet and a half from the curb upon the sidewalk, around a telegraph pole, and caused their names and business to be printed upon it, using it as a sign—they occupied the adjoining store to the defendants; and the defendants ordered the plaintiffs to remove the box, and threatened to remove it themselves and to obliterate the sign, and upon the plaintiffs refusing the defendants caused the names and sign on the box to be daubed with paint so as to obliterate them:

Held, that the defendants were liable to an action for malicious trespass, and were properly arrested and held to bail. Motion to vacate the order of arrest denied. (*Id.*)

See ESTOPPEL. (4 *Lansing*.)

O.

OBSTRUCTION OF WAY.

See PRIVATE WAY. (4 *Lansing*.)

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OFFER OF JUDGMENT.

See COSTS. (4 *Lansing*.)

OFFICE AND OFFICER.

1. A special jury will not be ordered to try the question of title, in the nature of *quo warranto*, the office of justice of a district court in the city of New York, there being nothing in the circumstances to make it such an *extreme case* as would warrant a special jury. (*The People* *vs.* *McGuire*, *ante*, 67.)

2. The provision of sec. 6, art. 2, title 6, chap. 3, part 1, of the revised statutes (1 R. S., 117), authorizing certain officers to hold over until a successor has duly qualified, applies only to an appointive, not an elective office. (*The People* *ex rel.* *agt.* *Ball*, 46 N. Y., 57.)

See JURISDICTION. (46 N. Y.)
SECRETARY OF STATE. (*Id.*)

3. To constitute a person an officer *de facto*, a mere claim to be such officer, and exercising the duties of the office, are not sufficient. It is well settled that there must be color for the claim, and a colorable title to the office. (*The Rochester and Genesee Valley Railroad* *vs.* *The Clarke National Bank*, 60 Barb. 234.)

4. An officer *de facto* is one who exercises the duties of an office under color of right, by virtue of an appointment, or election, to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any color of right, and on the other, from an officer *de jure*, who is in all respects legally appointed and qualified to exercise the office. (*Id.*)

5. When, by a judgment of the court of last resort, in a direct proceeding to determine the title of officers *de facto*, it has been adjudged that they have no rightful title to the office, but are mere usurpers, then, at least as to all who have notice of such proceeding and judgment, the color of authority has ceased; and this without regard to whether any body else has been inducted into the office or not. (*Id.*)

See HIGHWAYS. (60 Barb.)

OFFICIAL ACTS.

See JUDGES CHARGE. (4 *Lansing*.)
LOAN COMMISSIONERS. (*Id.*)
OVERSEER OF HIGHWAYS. (*Id.*)
PUBLIC OFFICERS. (*Id.*)

ONUS PROBANDI.

See EVIDENCE. (4 *Lansing*)
PENALTY. (*Id.*)
RAILROAD MUNICIPAL BONDS. (*Id.*)

OPENING DEFAULT.

See APPEAL. (4 *Lansing*.)

ORDER.

1. Defendant had in his hands for collection a claim, one half of the proceeds of which he had agreed to pay plaintiff. One M. drew an order upon defendant, requesting him to pay plaintiff \$500 out of the other half when collected, which order defendant accepted, and upon the acceptance plaintiff paid to M. the amount of the order. Defendant collected upon the claim \$1,050:

Held, that the acceptance of the order was an admission by defendant, that the moiety of the collection not agreed to be paid to plaintiff belonged to M., and was an undertaking to pay such moiety to plaintiff, not exceeding \$500. (*Richardson* *vs.* *Carpenter*, 46 N. Y., 660.)

See ASSIGNMENT. (4 *Lansing*.)

ORDER OF COURT.

1. Orders of the Supreme Court, in cases pending therein, are within its jurisdiction, however irregularly they may be obtained in practice. (*Pinckney* *vs.* *Hagerman*, 4 *Lansing*, 374.)

2. In an action for breach of promise of marriage the plaintiff had judgment, and an execution was issued thereon against the defendant's person.—*Held*, that an order of the court setting aside the execution and discharging the defendant from custody, and without notice as required by statute (Code, § 414), was not made without jurisdiction, and was a defense in an action for an escape against the sheriff, who had released the defendant under it. (*Id.*)

3. An order directing payment of arrears of alimony allowed is erroneous. (*Gallinger* *vs.* *Gallinger*, 4 *Lansing*, 473.)

See APPEAL. (4 *Lansing*.)

ORDER OF FILIATION.

See BASTARDY PROCEEDINGS. (4 *Lansing*.)

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ORDINANCE.

See NEW YORK CITY. (46 N. Y.)

ORGANIZATION.

See CONTRACT. (46 N. Y.)

ORNAMENTAL TREES.

See HIGHWAYS AND STREETS. (4 Lansing.)

OUSTER.

See CORPORATIONS. (47 N. Y.)

OVERSEER OF HIGHWAYS.

See HIGHWAYS. (60 Barb.)

1. It is the duty of an overseer of highways, whether directed by the commissioners of highways or not, to put the highways in his district in repair. (*Moran* vgt *McCleane*, 4 Lansing, 288)

OVERSEER OF POOR.

See BASTARDY PROCEEDINGS. (4 Lansing.)

OWNERSHIP

See ADVERSE POSSESSION. (4 Lansing.)
HIGHWAYS AND STREETS (*Id.*)

OYER AND TERMINER.

See COURT OF OYER AND TERMINER. (47 N. Y.)

See CRIMINAL LAW. (60 Barb.)

P.

PARENT AND CHILD.

1. To maintain an action for enticement from service, it must appear that the child, apprentice or servant, was at the time in the actual service of the parent or master, and that the moving cause of the desertion was the inducement held out by the defendant. (*Caaghey* vgt *Smith*, 47 N. Y., 244.)
2. In an action for unlawfully harboring and concealing plaintiff's minor son, and inducing him to enlist in the service of the United States, as a substitute for defendant:

Held, that the taking out of letters of administration by plaintiff, after the death of the minor son, upon his estate,

and as administrator, demanding and receiving of defendant the bounty money paid to the son upon his enlistment, and of the government his arrears of pay, were not a ratification of the contract of enlistment. They were not accounts received by the father as an equivalent for the loss of the son's service, to which he was entitled, but were debts due the estate of the son, to which plaintiff was entitled by the operation of the statute laws. (*Id.*)

3. That it was necessary to aver and prove knowledge, on the part of the defendant, that the minor owed service to plaintiff, and wrongfully deserted that service; that knowledge of the minority, and that the father was living, was sufficient to charge the defendant with legal inference therefrom, that the father was entitled to the custody, labor and services of the minor; but if there was an honest belief, on the part of defendant, that the youth had left the father's service with the father's consent, he was not liable. Also, that for the purpose of showing this, it was competent for defendant to prove the declarations of the minor, when he engaged with him, that his father was willing he should go into the military service of the government. (*Id.*)
4. That a refusal of the court to charge, that to support the action the plaintiff must satisfy the jury that the defendant, when he put the son into the service, was doing so against the plaintiff's consent, was not error. (*Id.*)
5. *Scabls* of a request to charge that, to render defendant liable, he must have known that the son was under the age of eighteen years at the time of the enlistment. (*Id.*)
6. That it was error for the court to charge that, if the plaintiff's son was under the age of eighteen at the time of the enlistment, the defendant was liable whether he knew it or not. (*Id.*)
7. As to whether a minor over eighteen years of age can lawfully enlist in the military service of the United States without the consent of his father. (*Id.*)
8. Defendant, upon settlement of accounts with his father, was found indebted in the sum of \$125, for which he gave his note. In action upon the note, brought by the personal representatives of the father after his decease, defendant upon the trial produced the note canceled; he testified

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that it had not been paid or satisfied; it appeared he had means of access to his father's papers:

Held, that under the facts in the case, possession of the note was not evidence of its discharge. The law does not presume a gift. (*Gray* agt. *Gray*, 47 N. Y., 452.)

See GIFT. (47 N. Y.)

9. Where the plaintiff, on enlisting and being mustered into service as a soldier, directed certain town bounty certificates to which he was thereby entitled to be delivered and paid to his father for the latter's benefit, and the father sold them, to a purchaser who afterward collected them from the town,—*Held*, the plaintiff being, at the time he gave the directions for delivery, a minor, that he still retained his property in the certificates, and might sue the town and recover upon them. (*Brown* agt. *Town of Canton*, 4 Lansing, 409)

10. Bounty offered to induce volunteering is no part of the earnings to which, in case of a minor, the father would have a right. (*Id.*)

PAROL EVIDENCE.

See EVIDENCE. (4 Lansing.)

PARTIES.

1. The wife of the grantee of mortgaged premises must be served with notice and made a party to the proceedings to foreclose the mortgage by advertisement under the statute, in order to cut off her inchoate right of dower. (*Northrup* agt. *Wheeler*, ante, 122.)

2. Section 401 of the Code does not authorize an application for a reference to take the deposition of a party to an action under that head. (*Cockey* agt. *Hurd*, ante, 140.)

3. On an examination of a party as a witness under sections 390 and 391 of the Code before a county judge, the judge has the power to compel the party to answer any and all questions which the judge shall determine relate to the issues raised by the pleadings in the action. (*Mudge* agt. *Gilbert*, ante, 219.)

4. Where the defendant is examined he may be compelled to answer questions relating to the defense interposed by him, and not pertinent to the affirmative claim made in the plaintiff's complaint, as well as to such facts as are essential to enable the plaintiff to make

out his case as alleged in the complaint (*Id.*)

5. C. delivered to plaintiff a negotiable promissory note, upon his undertaking to collect, at his own expense, and upon its collection pay to C. \$600:

Held, that the plaintiff was the party in interest, within sec. 111 of the Code, and could maintain an action upon the note. (*Eaton* agt. *Alger*, 47 N. Y., 345.)

6. It is proper to join the representatives of a deceased indorser of a promissory note as defendants with the maker. (*Id.*)

7. In an action against a married woman for fraud in a contract for the sale of her real estate, made by her husband as her agent, it is not necessary to join the husband. It is a matter "having relation" to her sole and separate property, and under the provisions of the statute of 1860, as amended in 1862 (chap. 172, laws of 1862), she may be sued the same as if she were a *feme sole*. (*Baum* agt. *Mullen*, 47 N. Y., 577.)

See BANKRUPT LAW. (47 N. Y.)
CAUSE OF ACTION. (*Id.*)
EJECTMENT. (*Id.*)
FORECLOSURE. (*Id.*)
INSURANCE, LIFE. (*Id.*)
PRINCIPAL AND AGENT. (*Id.*)
ACCOUNT. (60 Barb.)
EJECTMENT. (*Id.*)
FORECLOSURE SUIT. (*Id.*)
TENANTS IN COMMON. (*Id.*)

PARTIES TO ACTION.

1. Where the vendor in a contract for sale of land enters into a new contract for sale of the same land, the second vendee is a necessary party defendant in an action to enforce specific performance of the first contract. (*Fullerton* agt. *McCurdy*, 4 Lansing, 132.)

See HASTARDY PROCEEDINGS. (4 Lansing.)
BRIDGES. (*Id.*)
DEFENSES. (*Id.*)
SURFACE WATER. (*Id.*)

PARTIES TO CONTRACT.

See DOWER. (4 Lansing.)

PARTITION.

1. To maintain an action for the partition of lands, the plaintiff must, at the time of its commencement have actual or constructive possession in common with defendants. A substituting ad-

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verse possession is an absolute bar. (*Florence* *agt. Hopkins*, 46 N. Y., 182.)

2. The possession of one of several tenants in common may become adverse, when his acts amount to an exclusion of his co-tenants; and, until the excluded parties regain their possession, no one of them can bring partition. The duration of the adverse possession is immaterial. (*Id.*)
3. A wife, owning real estate as tenant in common with her husband, can maintain an action for partition against him. (*Moore* *agt. Moore*, 47 N. Y., 467.)
4. On partition in equity, the court will order an accounting, and dispose of all questions arising between the parties in relation to the land, and its use, and afford complete relief. (*Scott* *agt. Guernsey*, 60 Barb.)
5. In an action for a partition, the property consisted of village lots, and the referee held that it should be sold in separate lots, as it would thereby bring the most money. Some of the shares were small, some incumbered by judgments, and others reduced by liens for excess of rents received. Held that the decision that the property should be sold in parcels was not inconsistent with a finding that actual partition could not properly be made, and that a sale was proper. (*Id.*)
6. Where proceedings in partition were in accordance with the act of 1831, which authorized publication against Infant defendants who were non-residents, it was not necessary to appoint a guardian, unless they appeared. (*Clemens* *agt. Clemens*, 60 Barb., 366.)

See ACTION. (60 Barb.,)

TENANTS IN COMMON. (*Id.*)

TENANTS FOR LIFE AND IN REMAINDER. (*Id.*)

PARTNERS AND PARTNERSHIP.

1. The act of 1833 (*L. 1833, Ch. 281*), entitled an act to prevent persons from transacting business under *fictitious names*, prohibits the *transaction of business* in the name of a partner not interested in the firm, and requires that the designation "and company" or "and Co." shall represent an actual partner. A violation of the statute is deemed upon conviction a misdemeanor punishable by fine. (*Swords* *agt. Owen*, ante, 176.)
2. This being a penal statute, it implies a prohibition, and every act done against it is not only illegal but absolutely void. (*Id.*)
3. The prohibition being against *transacting business*, it renders it unlawful for a person to conduct his business under the designation of "and company" or "and Co." unless such addition represents an actual partner, and such person cannot make any *executory contract* whatever, which can be enforced by him, while using such prohibited title. (*Id.*)
4. Where this statute defense was interposed to a complaint by the plaintiffs who were alleged to be partners doing business under the firm name and style of "Swords, Betty & Co.," and the employment of the plaintiffs by the defendant as his brokers, to purchase stock—the purchase thereof—the neglect and refusal of the defendant to take the same, and a loss thereupon to the plaintiffs of \$3,000:
Held, on demurrer to such defense for insufficiency, that the judgment of the special term overruling the demurrer be affirmed, with costs.
5. An agency to transact business for an individual, is terminated by the formation of a copartnership. (*Hoppeck* *agt. Moses*, ante, 201.)
6. Where an agent has been in the habit of purchasing goods of a firm for and in the name of an individual, and subsequently purchases a bill of goods for, and has them shipped in the name of a copartnership firm, of which he asserts at the time, that the same individual for whom he formerly purchased is a member, the selling firm are bound to take notice of the termination of the purchaser's agency. (*Id.*)
7. The purchaser has no more authority by his acts or declarations in behalf of the new firm, to bind the individual for whom he formerly purchased by virtue of his former agency, than he had to take in a partner without the consent of such individual. As he had no authority from the latter to purchase goods in the name of the firm, his doing so was an assumption of authority of which the selling firm had legal notice by the manner of doing the business. (*Id.*)
8. The declarations of an individual agent of one member of a firm cannot be used as evidence to prove a partnership against either member of the firm. (*Id.*)
9. When the bank account of a firm is

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- kept in the name of one of its members, and all checks are drawn in his name, with the knowledge and assent of the others, the firm is liable upon a check thus drawn in its business. (*Crocker agt. Colwell*, 46 N. Y., 212.)
10. The dissolution of a co-partnership may be proved by parol, and a certificate signed by one of the co-partners to the effect, that he has purchased the interest of the other members of the firm, is competent evidence upon the question, whether such an agreement was in fact made, and as corroborative of the alleged parol contracts. (*Emerson agt. Parsons*, 46 N. Y., 560.)
11. A formal notice of dissolution, signed by all the partners and published, and a formal transfer of the partnership property to a third person, are not conclusive evidence of the time of dissolution. (*Id.*)
12. Where money is loaned upon the promissory note of one member of a co-partnership, and upon his individual credit, the fact that the money was applied to the payment of the partnership debts does not constitute the lender a creditor of the firm. It is only in cases where the name used, and to which credit is given, is that adopted by the firm, and used to designate the partnership, that it is held liable. (*Nat. Bk. of Salem agt. Thomas*, 47 N. Y., 15.)
13. To constitute a partnership, there must be a reciprocal agreement between the parties, not only to unite their stock, but to share in the risks of profit or loss upon a disposition thereof. Where goods are purchased by several parties under an agreement to hold in aliquot shares, with no agreement to sell jointly, but with an intent subsequently to make an arrangement for that purpose, until such arrangement is in fact made the purchasers are not partners, but simply tenants in common, and until that time neither of them has power to bind the others by his contracts. (*Baldwin agt. Burrows*, 47 N. Y., 190.)
14. Where tenants in common of a ship employ her in a series of voyages and lettings of the vessel for hire upon joint account, the earnings and expenditures upon and in respect to different voyages going into general account, it is a particular or *quasi* partnership for the general employment of the vessel, and the different voyages and adventures are connected together, and parts of the trade or business carried on by the owners as partners. (*Williams agt. Lawrence*, 47 N. Y., 462.)
15. An assignee, therefore, of the interest of one of the joint owners in a particular voyage or adventure can take only the interest which his assignor has in the earnings of the vessel after the adjustment of the partnership accounts. (*Id.*)
- See PRINCIPAL AND AGENT.* (47 N. Y.)
16. The good-will of a business firm is an important part of its property, and will be protected by a court of equity, whenever a proper case arises. (*Bisping agt. Clark*, 60 Barb.)
17. Where it is alleged, and not denied, that it constituted the most valuable part of the partnership assets, any appropriation of it by one partner, to the exclusion of another, unless it is acquired upon a fair sale, is a wrong which will be restrained by injunction. (*Id.*)
18. If during the existence of a limited partnership the special partner buys out the entire firm property, and continues the business in his own name, for his own account, he interferes with the firm business contrary to the provisions of section 17 of the act relating to limited partnership (1 R. S., 764), and renders himself liable as a general partner. (*First National Bank of Canandaigua agt. Whitney*, 4 Lansing, 374.)
19. And the liability is not confined to subsequent debts, but he is liable as general partner *ab initio*. (*Id.*)
- See CONTRACT.* (4 Lansing.)
- JUROR. (*Id.*)
- MARRIED WOMEN. (*Id.*)
- RAILROAD MUNICIPAL BONDS. (*Id.*)
- PATENTS.
- A state court has jurisdiction of an action founded upon a contract, although the validity of a patent may be involved therein. (*Middlebrook agt. Broadbent*, 47 N. Y., 443)
- See BEEBE agt. McKENZIE* (mem. 47 N. Y., 662.)
- PARTY WALL.
- See EASEMENT.* (4 Lansing.)
- ESTOPPEL. (*Id.*)
- PASSENGERS.
- See RAILROAD COMPANY.* (4 Lansing.)

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PASTOR AND PEOPLE.

See CONTRACTS. (4 *Lansing*.)
RELIGIOUS CORPORATION. (*Id.*)

PAYMENT.

See INSURANCE, LIFE. (46 *N. Y.*)
VENDOR AND VENDEE. (*Id.*)
CONSIGNEE AND CONSIGNEE. (60
Barb.)
PRINCIPAL AND AGENT. (*Id.*)
EXECUTORS AND ADMINISTRATORS.
(4 *Lansing*.)

PAYMENT INTO COURT.

See NEW YORK CITY. (4 *Lansing*.)

PEDDLERS,

See INTERNAL REVENUE ACT. (60
Barb.)

PENAL STATUTES.

1. The act of 1833 (*L. 1833, Ch. 281*), entitled an act to prevent persons from transacting business under *fictional names*, prohibits the transaction of business in the name of a partner not interested in the firm, and requires that the designation "and company" or "and Co." shall represent an actual partner. A violation of the statute is deemed upon conviction a misdemeanor punishable by fine. (*Sweda* agt. *Owen*, ante, 176.)
2. This being a penal statute, it implies a prohibition, and every act done against it is not only illegal but absolutely void. (*Id.*)
3. The prohibition being against transacting business, it renders it unlawful for a person to conduct his business under the designation of "and company" or "and Co." unless such addition represents an actual partner, and such person cannot make any executory contract whatever, which can be enforced by him, while using such prohibited title. (*Id.*)
4. Where this statute defense was interposed to a complaint by the plaintiffs who were alleged to be partners doing business under the firm name and style of "Sweda, Betzy & Co.," and the employment of the plaintiffs by the defendant as his brokers, to purchase stock—the purchase thereof—the neglect and refusal of the defendant to take the same, and a loss thereupon to the plaintiffs of \$3,000:

Held, on demurrer to such defense for insufficiency, that the judgment of the

special term overruling the demurrer be affirmed, with costs.

See PENALTY. (4 *Lansing*.)

PENALTIES.

1. Under the provisions of the act of 1857, to prevent extortion by railroad companies (chap. 185, laws of 1857), only one penalty of fifty dollars, together with the excess of fare, can be recovered for all acts committed prior to the commencement of the action. (*Fisher*, *Admr.* agt. *N. Y. C. & H. R. R. R. Cos.*, 46 *N. Y.*, 645.)

1. A recovery can be had under this act by a party who has paid the excessive fare when riding, simply for the purpose of obtaining the penalty. (*Id.*)

See FALSE STAMPS OR TRADE MARKS. (47 *N. Y.*)

See COMMON SCHOOLS. (60 *Barb.*)
HIGHWAYS. (*Id.*)

1. In an action to recover penalties imposed by statute (Laws, 1865, chap. 361) upon "whoever shall knowingly" do certain specified acts,—*Held*, that the plaintiff must show that the defendant violated the statute with personal knowledge of the facts constituting the offense; and that such knowledge could not be imputed to him from the acts of others, and their agency for, or relation to, the defendants. (*Verona Cent. Cheese Factory* agt. *Murlough*, 4 *Lansing*, 17.)

2. To punish for a misdemeanor, by fine or imprisonment, is not, it seems, in a legal sense, to inflict a penalty. (*Village of Lancaster* agt. *Richardson*, 4 *Lansing*, 136.)

PERJURY

See INDICTMENT. (4 *Lansing*.)

PERSONAL LIABILITY.

See ASSESSOR. (4 *Lansing*.)

PERSONAL TAXATION.

See ASSESSORS. (4 *Lansing*.)

PHYSICIANS AND SURGEONS.

1. In an action against a physician and surgeon, to recover damages for negligence and malpractice in the setting and treatment of a dislocated limb, it is for the jury to say whether, upon the evidence it is established to their satisfaction that the defendant did not

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use the means which experience has shown to be proper and necessary in order to justify a surgeon in assuming that he has restored the bones to their places. (*Carpenter agt. Blake*, 60 Barb. 468.)

8. In an action against a surgeon for malpractice, it would be error to instruct the jury that it is not material whether the defendant was or was not skillful in his profession. (*Id.*)

9. One holding himself out as a surgeon is liable as well for want of skill as for negligence; and the injured party may bring his action to recover for damages resulting from both, and recover on proving damages resulting from either. (*Id.*)

15. The failure to use skill, if the surgeon has it, may be negligence; but when the treatment adopted is not in accordance with established practice, but is positively injurious, the case is not one of negligence, but of want of skill. (*Id.*)

PLACE OF TRIAL.

1. Where in an action for false imprisonment, the defendant admits the imprisonment, but denies that it was unlawful, and as a second defense sets up matter in justification, to which latter defense the plaintiff demurs on the ground that the facts stated do not constitute a defense, and the plaintiff then moves to change the place of trial for the convenience of witnesses:

Held, that as the demurrer is to the merits of the action, a decision upon it in favor of the defendant would end the case, and the examination of witnesses would be unnecessary. Motion denied, as premature. (*Moore agt. Pillsbury*, ante, 142.)

PLEA OF TITLE.

See Costs. (4 *Lanning*.)

PLEADINGS.

1. In an action brought upon account for work, labor, and materials, the complaint alleged the amount of the account to be \$541.90, and that there was a balance due, after deducting all payments of \$175.75:

Held, that the complaint admitted a payment of \$366.15, and that defendant was not precluded from insisting upon this admission, by disputing the correctness of the items of the account. (*White agt. Smith*, 46 N. Y. 418.)

3. An answer, insufficient in form or substance, is not necessarily frivolous. Such an answer may be amended by leave of the court, but a frivolous answer is evidence of bad faith, and only ordinarily amendable. That only may be regarded as frivolous, which is made to appear so incontrovertibly, by a fair statement of it without argument. (*Youngs agt. Kent*, 46 N. Y. 672.)

3. When the answer puts in issue material allegations of the complaint, although its form and structure indicate that the intention of the pleader is to present a different question, yet the issues in fact presented cannot be disregarded, and the court cannot by a summary judgment, deprive the defendants of the right of a trial of the issues thus formed. (*Id.*)

4. Where a complaint upon a promissory note alleged a making and delivery of the note to the payee, and a sale and delivery thereof to plaintiff, who was owner, &c., the answer admitted "the making and delivery of said note as averred in the complaint," but denied each and every other allegation, and set up payment:

Held, the answer put in issue the sale and delivery, and authorized proof on the part of defendant that the payee was, in fact, the owner, and that the note had been paid to him. (*Allis agt. Leonard*, 46 N. Y. 688.)

See COUNTER CLAIM. (46 N. Y.)

LIBEL. (*Id.*)

SPECIFIC PERFORMANCE. (*Id.*)

5. In an action upon a promissory note brought by the payee against the indorser, the complaint alleged that the note was executed and indorsed as a condition of a loan by the payee to the makers, and as security for the payment thereof, and then set out the note, which by its terms was given "for value received."—*Held*, that the averments were sufficient to authorize evidence of the indorser's privity with the negotiation, and if he indorsed with a knowledge that his name was required by the payee as a condition of making the loan, and as security for its payment, he was placed in the same condition to the payee as though it had been done by agreement; that the value received, expressed in the note, was a sufficient averment of consideration, which, by the other allegations, was shown to be the loan, and that these averments of making, execution and indorsement over were equivalent to an averment of delivery;

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and that, although to negotiate the note plaintiff must become the first indorser, yet the indorser, being privy to the transaction and knowing the apparent relation was not the actual one, was liable. (*Meyer* agt. *Hibner*, 47 N. Y., 265.)

2. In an action for goods sold and delivered, which are claimed to have been purchased by defendants' agent, it is not necessary to set up in the answer a revocation of the authority of the agent, and notice thereof to the plaintiffs, prior to the sale. Such evidence is proper under a general denial. (*Hier* agt. *Gratz*, 47 N. Y., 278.)

See AMENDMENT. (47 N. Y.)

EVIDENCE. (*Id.*)

INSURANCE LIFE. (*Id.*)

TRIAL. (*Id.*)

ANSWER. (60 Barb.)

COMPLAINT. (*Id.*)

EQUITY. (*Id.*)

3. Where the complaint alleges mistake of facts, and demands the rescission of a contract for that reason, and the proof shows also the defendant's fraud, an amendment conforming the pleading to the facts proved is allowable under the Code (§ 176). (*Smith* agt. *Mackie*, 4 Lansing, 41)

See BAIL. (4 Lansing.)

BRIDGES. (*Id.*)

DEFENSES. (*Id.*)

FORECLOSURE. (*Id.*)

INDICTMENT. (*Id.*)

PRACTICE. (*Id.*)

PLEDGE.

1. Plaintiff was the owner of 134 shares of the stock of the First National Bank of Johnsonville, the certificate of which he delivered to and left with G. B. & D., his stock brokers, to secure any balance of account. Upon the certificate was indorsed a blank assignment, and power of attorney to transfer, signed by plaintiff, purporting on its face to have been executed "for value received." Plaintiff's indebtedness on the account was \$3,000, and interest. G. B. & D., without authority, and without plaintiff's knowledge, pledged the scrip with other securities, to secure an advance of \$45,135. Defendant at the request of G. B. & D., paid the advance and received the securities. The other securities were sold, leaving \$15,219.81 of the advance unpaid:

Held, that defendant was entitled to hold the stock, for the full amount remain-

ing unpaid. (*McNiel* agt. *The Trust Nat. Bk.*, 46 N. Y., 325.)

See STOCK BROKERS. (46 N. Y.)

POLICE COMMISSIONERS.

1. The board of police commissioners of the city of Troy, have the power, under the act by which they were organized, to remove a member of the police force by reason of his being over age. And it makes no difference whether the member removed, was appointed before the commissioners had by their rules and regulations, fixed the ages of its members, or not. (*The People* agt. *The Police Comrs. of Troy*, ante, 385.)
2. As the commissioners have a right to determine whether a member is disqualified from acting under the rules and regulations which they have adopted, their action in removal cannot be disturbed unless they have transcended their powers. And as they clearly have jurisdiction in such case, even if they act unlawfully, the remedy is not by *mandamus*, but by a *common law certiorari*. (*Id.*)

POLICY OF INSURANCE.

See INSURANCE. (4 Lansing.)

POSSESSION OF REAL PROPERTY

1. Where a regular judgment is entered giving the plaintiff possession of real property, and execution is issued putting him in actual possession, on setting aside the judgment and execution, the proper remedy of the defendant to compel restoration of the property, is to apply, under the Code, to the special term of the court for an order to show cause why possession should not be restored to him and an order granted on the hearing of the order to show cause, is sufficient authority to restore possession to the defendant. If disobedience to such an order is made it may be punished as for a contempt. (*Dawley* agt. *Brown*, ante, 17.)
2. Where an order of restoration at special term is made, after setting aside judgment of dispossession obtained by the plaintiff—the plaintiff being in lawful possession of the premises, it is irregular to include in such order of restoration granted to the defendant, an *injunctive clause* restraining the plaintiff from entering into or interfering with the possession of the premises and restraining him from cultivating or otherwise using the premises. When

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restored to possession, the remedy of the defendant would probably be by action for any illegal entry or injury done the premises by the plaintiff. (*See S. C. ante, 17.*) (*Dawley agt. Brown, ante, 22.*)

POWER.

When a public body is clothed with power to do an act, which the public interest requires to be done, and the means of performance are placed at its disposal, the execution of the power may be insisted on as a duty, notwithstanding the statute conferring it is only permissive. (*Hines agt. The City of Lockport, 60 Barb.*)

POWER OF ATTORNEY.

See INSURANCE. (4 *Lansing.*)
TRUSTS AND TRUSTEES. (*Id.*)

POWER IN TRUST.

See TRUSTS AND TRUSTEES. (4 *Lansing.*)

POWER OF SALE.

See EQUITABLE CONVERSION. (4 *Lansing.*)

POWERS OF SUPERVISORS.

See SUPERVISORS. (4 *Lansing.*)

PRACTICE.

1. When a referee refuses to insert in a case matter relating to points and claims alleged to have been made upon the trial before him, the proper remedy is by motion to the court below, argument of the appeal from the judgment to compel the referee to insert such matter upon settlement of the case, and to send the case back for further findings, if necessary to a proper review of the judgment. (*Lester agt. Field, 47 N. Y. 407.*)
2. A party cannot require a referee to find facts and conclusions of law against him in such form as he may frame, and to allow exceptions to such adverse findings and conclusions. (*Id.*)
3. A counter-claim cannot be stricken out as irrelevant, under section 166 of the Code. (*Feltrecht agt. McKay, 47 N. Y. 426.*)
4. If there is any defect in the counter-claim, it must be reached by demurrer or by motion to make more definite

and certain under the last clause of section 160. (*Id.*)

5. The office of a bill of particulars is to apprise defendants of the items which the plaintiff expects to prove, and to restrict the proofs to the matters specified. The merits of the case cannot be inquired into upon motion for a bill, nor can the sufficiency of the bill be determined by the allegations of the answer. (*Matthews agt. Hubbard 47 N. Y. 428.*)
 6. The bill of particulars need not state more than plaintiff is bound to prove. If the specifications do not accord with the facts, or if they omit matters essential to the plaintiff's case, the defendant can take advantage of it upon the trial, not upon motion to strike out the items objected to. (*Id.*)
 7. If an answer containing a denial of all the allegations of the complaint, except as thereafter stated, is rendered indefinite, uncertain or complicated, the remedy is by motion to make it more definite, and not by the exclusion of evidence upon the trial. (*Greenfield agt. Mass. Mut. L. Ins. Co. 47 N. Y. 430.*)
 8. Under a general or specific denial of any part of a complaint, which plaintiff is required to prove to maintain his action, defendant may give evidence to disprove it. (*Id.*)
 9. When a new trial has been granted in an action tried by a jury upon a record presenting questions of law only, and the record presents no question or exception upon which the order could be sustained in this court, except such as, if decided adversely to the party complaining would be conclusive against him, so that in no aspect could his case be varied or put in better form upon a retrial, an appeal to this court is proper and advisable, but not otherwise. (*Dickson agt. B. and Seventh Avenue R. R. Co. 47 N. Y. 507.*)
- See* APPEAL. (47 *N. Y.*)
DEPOSITIONS. (*Id.*)
MOTIONS AND ORDERS. (*Id.*)
TRIAL. (*Id.*)
10. If there is any foundation for the objection that a recovery has been had upon grounds not alleged in the complaint, it should be made in season. After judgment, it is too late for the unsuccessful party to avail himself of it. (*Updike agt. Abel, 60 Barb. 15.*)
 11. Under the system of practice established by the Code, in order to entitle a defendant to a new trial, on the

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ground that the plaintiff has not proved the case made by his complaint, it must appear that the cause of action is unproved in its entire scope. (*Id.*)

12. When a non-suit is moved for upon the whole case and evidence, and the right judgment or decision is rendered, it will not be set aside, as a general rule, upon exceptions to such decision, because an erroneous reason was given for denying the motion. But if the point presented for the motion be a sound one, it must be clearly avoided or over-reached by other clear facts or points in the case; or else an exception to the erroneous ruling must prevail. (*Shoemaker* agt. *The Glen Falls Insurance Company*, 60 Barb., 81.)

13. Service by publication is valid within the jurisdiction by whose laws it is authorized, but of no validity beyond it. (*Phelps* agt. *Baker*, 60 Barb., 107.)

14. If a complaint be amended, a copy must be served on the defendant, and the right to answer is a substantial right. Hence the neglect to serve an amended complaint on infant defendants, in a foreclosure suit, is, at least, a great irregularity. But if too much time has elapsed, and too many innocent parties are interested, the judgment will not be disturbed on that ground. (*McMurray* agt. *McMurray*, 60 Barb., 117.)

15. The 33rd section of the Code, which provides that in case of the death of a sole plaintiff, the action may be continued in the name of his representative or successor in interest, does not apply to a case where a sheriff sues as such, and dies during the term at which the action is tried; and his deputy is also dead. (*Orser* agt. *The Glenville Woolen Company*, 60 Barb., 377.)

16. Such a case is provided for, however, by the Revised Statutes, which direct that "where an action is authorized or directed by law to be brought in the name of a public officer, his death or removal shall not abate the suit, but the same may be continued by his successor; who shall be substituted by the court, and a suggestion of such substitution shall be entered on the record." (3, *R. S.* 670, 5th ed.) (*Id.*)

See CREDITORS. (60 Barb.,)
EVIDENCE. (*Id.*)
HIGHWAYS. (*Id.*)
INFANTS. (*Id.*)
JURISDICTION. (*Id.*)
USURY. (*Id.*)

17. A cause of action against executors,

for services rendered their testator upon his retainer in an action brought against him, is improperly united with a cause of action upon a special agreement with the executors, for continuance of the services in the same action to which they have been substituted, as defendants, for the testator after his decease. (*Austin* agt. *Monroe*, 4 Lansing, 67.)

18. Where the plaintiff brought his action against two defendants, asking judgment for the recovery of moneys paid on a sale of worthless stock, and alleging fraudulent representations and collusion, by which he had been induced to make the purchase, and a tender of the stock to one of the defendants, and a referee having, upon insufficient evidence of collusion between them and of joint interest directed judgment against the defendants jointly, it seems that the court, on appeal, would refuse to sever the judgment, affirm it as to the only defendant shown to be liable, and set it aside as to the other, or in case each were shown to be equally liable, to affirm the judgment against such defendant as the plaintiff might elect, inasmuch as the action by reason of the need of necessary averments in the complaint was not maintainable for damages on account of fraud, and was not maintainable against one of the defendants for the purchase-money, on the ground of failure of consideration or rescission of contract, because the stock had not been tendered back to him. (*Hubbelt* agt. *Alden*, 4 Lansing, 214.)

19. Where the court make an order upon exceptions to the report of an interlocutory referee, and render judgment in accordance with the order, upon appeal from the judgment the court will not review such order, unless the exceptions to the final conclusions of law bring up for review some question affected by it. (*Russell* agt. *Dyken*, 4 Lansing, 399.)

20. On a trial before a referee the complaint being for trespass on land, the plaintiffs' proofs failed to establish a cause of action in trespass, but was sufficient to sustain one for waste. No application was made to conform the pleadings to the proof, or to apply the law to the undisputed facts without reference to the particular allegations of the complaint—*Held*, that the plaintiffs' complaint was properly dismissed. (*Tracy* agt. *Amai*, 4 Lansing, 500.)

See ACTION. (4 Lansing.)
APPEAL. (*Id.*)

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ARREST. (*Id.*)
 BAIL. (*Id.*)
 COSTS. (*Id.*)
 EJECTMENT. (*Id.*)
 EVIDENCE. (*Id.*)
 EXECUTION. (*Id.*)
 HUSBAND AND WIFE. (*Id.*)
 ORDER OF COURT. (*Id.*)
 PARTIES TO ACTION. (*Id.*)
 PLEADINGS. (*Id.*)
 RAILROAD MUNICIPAL BONDS.
 (*Id.*)
 SUBMISSION OF CONTEST, (*Id.*)
 SURFACE WATER. (*Id.*)

PREMIUM NOTES.

See INSURANCE. FIRE. (46 *N. Y.*)
 INSURANCE COMPANIES. (66 *Barb.*)
 INSURANCE. (4 *Lansing.*)

PRESCRIPTION.

1. Where the parties maintaining and using a dam upon a stream below plaintiff's dam, had for more than twenty years used flush boards upon their dam, more or less at different seasons of the year, which were so far removed when they materially interfered with plaintiff's mill by flowing back water upon his wheel, and when complaint was made, as to satisfy the demand, but were not entirely removed, one board being almost, if not quite universally left on after complaint, without further objection:

Held, that the proprietors of the lower dam had acquired a prescriptive right to place and use flush boards thereon to a height, that would not materially obstruct the action of plaintiff's mill wheels. The right to be measured and limited only by its non-injury to the use of plaintiff's mill. (*Hall* agt. *Angsbury*, 46 *N. Y.*, 622.)

See ADVERSE POSSESSION. (4 *Lansing.*)
 EASEMENT. (*Id.*)
 ESTOPPEL. (*Id.*)

PRESIDENT'S PROCLAMATION.

See CONTRACT. (4 *Lansing.*)

PRESUMPTION.

See FINDINGS OF FACT AND CONCLUSIONS OF LAW. (46 *N. Y.*)
 VENDOR AND VENDEE. (*Id.*)

1. The presumption of law, that when the owner of a whole tenement divides the same and conveys a portion, the parties contract with reference to the

visible physical condition of the property at the time, may be repelled by actual knowledge on the part of the contracting parties of facts which negative any deduction to be drawn from the apparent condition. Where there is proof of such knowledge they are presumed to have contracted not solely with reference to its condition, as it would have been presented to a stranger, but as it was known to be by the parties. (*Simmons* agt. *Glozman*, 47 *N. Y.*, 3.)

2. Where, from the facts of the case, it appears that a violent death was either the result of accidental injuries or of a suicidal act of deceased, the presumption of law is against the latter. (*Mallory* agt. *The T. Ins. Co.* 47 *N. Y.*, 52.)

3. The law presumes, as against a debtor in the absence of proof to the contrary, that an assignment of the demand against him was made with due authority and upon a good consideration; also, that it is fair rather than fraudulent. The fact, therefore, that an assignment by the president of a bank was in consideration of a private indebtedness on his part to the assignee, is not sufficient to raise a presumption in favor of the debtor that the assignment was without authority and in violation of duty, and does not effect the validity of the assignment. (*Belden* agt. *Meeker*, 47 *N. Y.*, 307.)

See EASEMENT. (47 *N. Y.*)
 EVIDENCE. (*Id.*)
 NAVIGATION. (*Id.*)
 BRIDGES. (4 *Lansing.*)
 CHATTEL MORTGAGE. (*Id.*)
 COMMON CARRIER. (*Id.*)
 EVIDENCE. (*Id.*)
 HIGHWAYS AND STREETS. (*Id.*)
 INSURANCE. (*Id.*)
 JUDGMENT. (*Id.*)
 PENALTY. (*Id.*)
 RAILROAD MUNICIPAL BONDS.
 (*Id.*)

PREVIOUS SUIT.

See EVIDENCE. (4 *Lansing.*)

PRINCIPAL AND AGENT.

1. An agency to transact business for an individual, is terminated by the formation of a copartnership. (*Hoppeck* agt. *Moses*, ante, 501.)

2. Where an agent has been in the habit of purchasing goods of a firm for and in the name of an individual, and subsequently purchases a bill of goods for, and has them shipped in the name of a

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copartnership firm, of which he asserts at the time, that the same individual for whom he formerly purchased is a member, the selling firm are bound to take notice of the termination of the purchaser's agency. (*Id.*)

3. The purchaser has no more authority by his acts or declarations in behalf of the new firm, to bind the individual for whom he formerly purchased by virtue of his former agency, than he had to take in a partner without the consent of such individual. As he had no authority from the latter to purchase goods in the name of the firm, his doing so was an assumption of authority of which the selling firm had legal notice by the manner of doing the business (*Id.*)

4. The declarations of an individual agent of one member of a firm cannot be used as evidence to prove a partnership against either member of the firm. (*Id.*)

5. An agent, acting within the scope of his authority, and disclosing his agency, will not be personally bound, unless upon clear and explicit evidence of such an intention. The rule is still stronger in the case of a public agent. (*Hall agt. Lauderdale, 46 N. Y., 70.*)

6. An action cannot be maintained against an agent, although, having money of his principal's in his hands, applicable to the payment of the debt of his principal, he refuses pay it. He is responsible to his principal only for neglect of duty, and owes no legal duty to the creditor. (*Id.*)

See HUSBAND AND WIFE. (46 N. Y.)
INSURANCE, LIFE. (*Id.*)
STATUTE OF FRAUDS. (*Id.*)
STOCK BROKERS. (*Id.*)

7. Defendants represented a voluntary association which owned a cheese factory; this they leased to C. He contracted to manufacture cheese for them at a specified sum per hundred pounds. No right of supervision was reserved. Defendants carried on the business by furnishing the materials, taking the products and selling them in the market, as an article manufactured by them.—*Held*, that as to the public they assumed the characters of principals, and adopted the responsibility of the manufacture, and were liable for the frauds of C., or his subordinates, in the manufacture of the cheese. (*Duret agt. Burton. 47 N. Y. 167.*)

8. Where one assumes to act as agent for a single member of a firm in the sale of partnership property, the receipt

by the assumed principal of the money received on the sale is a ratification of the agency, and an adoption of the means by which it was obtained. And when the purchaser was ignorant of the existence of the partnership, the other partners need not be joined in an action, to recover back the money paid, for fraud on the part of the agent, or for mistake. (*Lestie agt. Wiley, 47 N. Y., 648.*)

9. The declared principal becomes liable immediately upon the receipt of the money, and his subsequent division of it among persons who were strangers in the transaction to the plaintiff cannot affect his liability. (*Id.*)

See BANKS AND BANKING. (47 N. Y.)
RAILROAD CORPORATIONS. (*Id.*)

10. It is well settled that a debtor is authorized to pay an agent any sum which is due upon a security which has been entrusted to the agent by the holder, for the purpose of collecting any part of it; as where the agent has been authorized to receive the interest only, but receives the principal. (*Doubleday agt. Kress, 60 Barb., 181.*)

11. Indeed the authorities go to the extent of holding a payment valid, made to an agent who is merely entrusted with the possession of the security, without express authority to receive or collect any part of it. The ostensible authority attributed to a party to whom is entrusted an instrument to secure the payment of money, is to receive payment according to its terms. (*Id.*)

12. Although an indorsement is requisite to render a note negotiable, it is not necessary to the validity of a payment. A delivery of the note, to the maker, is all that is required, upon the payment thereof, either to the payee or his agent. (*Id.*)

See CONSIGNOR AND CONSIGNEE. 60
Barb.,
COMMON CARRIER. (4 *Lawing.*)
INSURANCE (*Id.*)
JUDGMENTS. (*Id.*)
NOTES AND BILLS. (*Id.*)
PENALTY. (*Id.*)
SEPARATE ESTATE OF MARRIED
WOMEN. (*Id.*)

PRINCIPAL AND SURETY.

1. Defendant guaranteed, that B. & S. should receive and pay for a steam engine and two boilers, of a given capacity and power, particularly des-

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cribed, at an agreed price. By an arrangement of the principals, without the assent of the surety, an engine with three boilers, and of a greater capacity and power, at an additional price, was substituted:

Heid, that the change in the contract was a material one, imposing entirely new obligations upon the contracting parties, and discharged the surety from any liability. (*Grant agt. Smith*, 46 N. Y., 93.)

See HUSBAND AND WIFE. (46 N. Y.)

2. The surety upon a promissory note is not discharged from liability by neglect of the payee to proceed upon request after maturity, for its collection against the principal debtor, where the latter is insolvent at the time of the request, and so remains, and the debt is uncollectible from him. (*Field agt. Cutler*, 4 Lansing, 195.)

3. *Craig agt. Parkis* (40 N. Y., 181) distinguished. (*Id.*)

See LEASE. (4 Lansing.)

PRINCIPAL IN SECOND DEGREE

See EVIDENCE. (4 Lansing.)
INDICTMENT. (*Id.*)

PRIORITY.

See CREDITORS. (60 Barb.,)

PRIVATE WAY.

1. The extent to which the owner of land may interfere with the use of a private way, to which it is subject, by gates or bars, depends upon the purposes for which the way is used, and the necessity for their erection to protect his property. (*Huson agt. Young*, 4 Lansing, 63.)

2. In the case of a way over agricultural land, for the benefit of owners of the same description of lands, the fair criterion of extent of obstruction is, whether the owner of the servient estate, having no interest to embarrass his own user of it, would, for the protection of his other property, be likely to erect such obstructions. In every case, the question is for the jury. (*Id.*)

PRIVITY OF CONTRACT.

See ACTION. (4 Lansing.)
CONTRACT. (*Id.*)

PRIVILEGED COMMUNICATION.

1. The proprietors of a mercantile agency engaged in collecting and publishing for circulation among all its patrons, information as to the standing and financial credit of merchants and traders, are liable for a false report thus disseminated, injurious to the credit of the subject of it, although made in good faith and upon information deemed reliable. Such a communication is privileged, only when it is confined to those having an interest in the information. (*Sunderlin et al. agt. Bradstreet et al.*, 46 N. Y., 188.)

PROCEEDINGS FOR BONDING MUNICIPAL CORPORATIONS.

See RAILROAD MUNICIPAL BONDS. (4 Lansing.)

PROCEEDINGS FOR CONTEMPT.

See EXECUTION. (4 Lansing.)

PROCEEDINGS IN REM.

See FEDERAL COURTS. (4 Lansing.)

PROMISE FOR BENEFIT OF THIRD PERSON.

See CONTRACT. (46 N. Y.)

PROMISE TO ONE FOR BENEFIT OF ANOTHER.

See ACTION. (4 Lansing.)

PROMISSORY NOTES.

See BILLS, NOTES, CHECKS. (47 N. Y.)

1. Where the defendant, at the time of making a promissory note, was not under arrest or imprisonment, but was at his residence in this state, where he had committed no criminal offense for which he could be arrested or imprisoned; having made, at most, as was alleged by the payee, only some fraudulent representations in respect to the value of land upon which he had a mortgage that he had sold to the payee of the note; which sale, and the representations that induced it, were made in the State of Illinois; it was held that as there was no ground for the defendant's arrest, in either State, on a criminal charge, or for his being taken to Illinois in any criminal proceeding for such fraud, a threat of such an arrest constituted no defense to an action upon the note. (*Knapp agt. Hyde*, 60 Barb., 80.)

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2. Where in an action upon a promissory note, the case does not show that the note was negotiable, its negotiability will not be presumed. (*Beane* agt. *Williams*, *Id.* 346.)

3. If a note is not negotiable, the assignee takes it subject to all defenses of the maker against the payee; whether it be due at the time of the assignment or not; the same as the holder of a negotiable instrument does, who takes it after it has become due. (*Id.*)

See ANSWER. (60 *Barb.*,)
GENERAL ISSUE. (*Id.*)
MARRIED WOMEN. (*Id.*)
MENACES. (*Id.*)
PRINCIPAL AND AGENT. (*Id.*)
USURY. (*Id.*)
NOTES AND BILLS. (4 *Lawing*.)

PROPERTY EXEMPT FROM EXECUTION.

See EXECUTION. (4 *Lawing*.)

PROOF.

See EVIDENCE. (4 *Lawing*.)

PROTEST.

See BANKS AND BANKING. (47 *N. Y.*)

PUBLICATION.

See PARTITION. (60 *Barb.*,)

PUBLIC OFFICER.

1. Instructions to the jury, to the effect that a public officer may be held liable for the maliciousness of his motives in the performance of acts assumed to be fully authorized and warranted in law, are erroneous. (*Moran* agt. *McLearn*, 4 *Lawing*, 283.)

PURCHASE.

See CONTRACT. (4 *Lawing*.)
SALE OF CHATTELS. (*Id.*)

Q.

QUANTUM MERUIT.

See RAILROAD COMPANY. (4 *Lawing*.)

QUESTIONS OF LAW AND FACT.

See SUBMISSION OF CONTROVERSY. (46 *N. Y.*)

See APPEAL. (47 *N. Y.*)
COSTS. (*Id.*)
EASEMENT. (*Id.*)
NAVIGATION. (*Id.*)
RAILROAD CORPORATIONS. (*Id.*)
TRIAL. (*Id.*)

1. Where a fact not in itself, or in view of attending circumstances, incredible or improbable, is positively and distinctly testified to by witnesses who are unimpeached and uncontradicted, it is error if the court submit it to decision of the jury. (*Robinson* agt. *McManus*, 4 *Lawing*, 380.)

See EJECTMENT. (4 *Lawing*)
EVIDENCE. (*Id.*)
INSURANCE. (*Id.*)
JUDGE'S CHARGE. (*Id.*)
PRIVATE WAY. (*Id.*)

QUO WARRANTO.

See CORPORATIONS. (47 *N. Y.*)

R.

RAILROADS.

1. In an action against a railroad company for causing death from negligence; it appeared from the plaintiff's testimony, that the day was very stormy—wind high, blowing hard and snow falling very fast, which made it difficult to see a train of cars at the place where the highway crossed the railroad, more than six or eight rods distant; that just before the deceased attempted to cross the track with his horses and wagon, a carman with a load crossed the track, and there were other teams approaching the track behind that of the deceased. (*Hackford* agt. *N. Y. Cent. & Hudson R. R. Co.*, ante, 222.)

2. The drivers of other teams stopped, seeing the approaching engine, and cried "whoa" to the deceased just before he got on the track; the deceased did not regard it but drove on and was instantly struck and killed. (*Id.*)

3. The witnesses testified that as the engine was approaching the track the bell was not rung nor was the whistle blown; the train was running at the speed of about 20 miles an hour, and there was no sign indicating the crossing. The railroad track was higher than the land on either side, and higher than the highway. Near the crossing (in fair weather) a train could be seen for a distance of 1400 feet in one direction, and an eighth of a mile in the other. (*Id.*)

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4. The plaintiff was *non-suited* at the circuit, on the ground that the deceased was himself guilty of negligence:

Held, by the general term, on appeal, that the court committed an error in refusing to submit the question of concurring negligence of the deceased to the jury. Had the day been a fair one so that there was nothing to prevent a person from seeing and hearing an approaching train, the deceased would have been chargeable with the gross-negligence. (*Id.*)

5. On a trial of this kind, the plaintiff is not bound to disprove affirmatively his own negligence. But where on the trial there is evidence of negligence on the part of the plaintiff, whether it comes from plaintiff's or defendants' witnesses, the plaintiff must overcome it, in order to entitle himself to recover. In this way, and in this way only, is the plaintiff bound to disprove his own negligence. (*Id.*)

6. Where the owner of freight; which is to be carried by several railroad companies before it reaches its final destination, enters into a special contract with the railroad company from where it starts, to carry the freight, for a specified price to a certain station, which is the termination of the route of said railroad, and there to be delivered to another railroad as a connecting line, the owner, in consideration of the reduced price on the freight, agreeing to assume the risk of fire and other contingencies, which risk, and the other stipulations, are made applicable, by the general printed form of the contract, to all the other companies, is not a *through contract*, which enables the companies after the first, to avail themselves of the owner's special agreement with the first. (*Babcock* *ag.* *The Lake Shore & Mich. Southern R.R. Co.*, ante, 317.)

7. The latter companies take the freight under the liability of common carriers, and if the freight is destroyed by fire while in the possession of one of them it is liable as a common carrier. (*Id.*)

8. It must however appear to be clear by the special contract of the owner with the first railroad, that it was intended to cover only the route of that road. And in construing such a contract, the printed form must give way to the written word where it is inconsistent with the latter. (*Id.*)

9. Two boys, one twelve and the other five years of age—the eldest leading the youngest by the hand, undertook to cross the Second Avenue, from west

to east, near 28th Street in the city of New York, about noon in the day; a Second Avenue street-car was approaching them, and about ninety or a hundred feet south of them, upon an up grade, when they reached the westerly rail of the railroad; and after the eldest boy had cleared the easterly track and the horses, the off horse struck the youngest boy—who was a little behind, knocked him down and the forward wheel of the car ran over him and severed his right arm near the shoulder. (*Pendrell* *ag.* *Second Ave. R.R. Co.*, ante, 399.)

10. On the trial the testimony showed that the car in which was but a few passengers, was driven with great rapidity—so much so that the witness would be unable to get on or off it; that the driver stood on the front platform leaning his shoulders against the car, with loose reins which he was swinging up and down upon the horses to urge them to greater speed; that with proper driving and care the car could have been stopped within sixteen to twenty-two feet, and the collision avoided:

Held, that the judgment dismissing the complaint, and the order denying a new trial upon the judges' minutes, appealed from, be set aside, and a new trial ordered. (*Id.*)

11. Where the employee of a railroad company (a conductor), under a mistake of facts, or of judgment, ejected a person from the car in which he was a passenger, which act was not justified by the passenger's misconduct:

Held, that the company was liable. So, also, where there was justifiable cause for ejection, but excessive force was used (not wantonly or maliciously). (*Higgins* *ag.* *The W. T. and R. R. Co.* 46 N. Y., 23.)

12. Railroad corporations are not, in the purview of the tax laws, non-residents of any town in which they possess lands; such lands are to be assessed against them, the same as against inhabitants of the town, and not as non-resident lands. (*The People ex rel.* *ag.* *Cassidy et al.* 46 N. Y., 46.)

13. The word "laborer" and "labor," as used in the general railroad act of 1850 (sec. 12, chap. 140, laws of 1850), which gives a laborer a claim against the company for the indebtedness of a contractor in certain cases, and to a limited amount, are used in their ordinary and usual sense, and imply the personal service and work of the individual designed to be protected. The

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former does not include one who contracts for and furnishes the labor and service of others, or who contracts for and furnishes a team or teams for work, whether with or without his own services. (*Balch* agt. *N. Y. & O. M. E. R. Co.*, 46 *N. Y.*, 521.)

14. Passenger depots; convenient and proper places for the storing and keeping of cars and locomotives; proper, secure and convenient places for the receipt and delivery freight, and for the safe and secure keeping of property between the time of its receipt and dispatch, or after its arrival and discharge, and before delivery, are among the acknowledged necessities for the running and operating a railroad, and the right to take lands for those purposes, is included in the grant of power given by the general railroad act as amended in 1869 (laws of 1869, chap. 237, sec. 1), which authorizes railroad corporations to acquire real estate "for the purposes of its corporation, or for the purpose of running or operating" its road. (*In re N. Y. & H. R. R. Co.* agt. *Kip*, 46 *N. Y.*, 564.)

15. The B. & N. F. R. R. Co. and the B. & L. R. R. Co., both of whose lines run through the village of Tonawanda to the city of Buffalo, entered into an agreement, by which the right of way on the line adopted by the B. & L. R. R. Co. was to be procured, and the grading, &c., to be done at joint expense, each company to lay one track at its own expense. The B. & L. R. Co. was engaged in constructing its track, when it was consolidated with other companies into the N. Y. C. R. R. Co., which latter company completed the track and ran its trains over it from Lockport to Buffalo. The B. & N. F. R. R. Co. never laid any track upon the line acquired under the agreement. The N. Y. C. R. R. Co. entered into an agreement with the B. & N. F. R. R. Co., by the terms of which it acquired the right to use the road, property and franchise of the latter during its corporate existence. By its charter the latter company was authorized to charge four cents a mile for transporting passengers. Subsequently, under the provisions of chap. 302, laws of 1855, the N. Y. C. R. R. Co. acquired all the stock of the B. & N. F. R. R. Co., and filed the required certificate with the secretary of state:

Held, that the contract between the N. Y. C. and the B. & N. F. R. R. Cos. was valid. By it the former became the lessee of the latter within the meaning of the statute of 1855, and by a compliance with the provisions of

that statute, became vested with all the property and franchises of the latter, including the right to charge four cents a mile over its track, but this right did not extend to the track constructed by the B. & L. R. R. Co., or by the N. Y. C. R. R. Co., its successor. (*Fisher* agt. *The N. Y. C. & H. R. E. R. Cos.*, 46 *N. Y.*, 644.)

16. Under the provisions of the act of 1867, to prevent extortion by railroad companies (chap. 185, laws of 1857), only one penalty of fifty dollars, together with the excess of fare, can be recovered for all acts committed prior to the commencement of the action. (*Id.*)

17. A recovery can be had under this act by a party who has paid the excessive fare when riding, simply for the purpose of obtaining the penalty. (*Id.*)

See COMMON CARRIER. (46 *N. Y.*)
TOWN BONDING. (*Id.*)

18. Plaintiff, a passenger upon defendant's car, desiring to alight, passed out upon the platform and requested the conductor to stop the car, and refused to get out until the car had come to a full stop, whereupon, and while the car was in motion, he threw her from the car with great violence out upon the pavement, whereby she was seriously injured.

Held, that the act was a wanton and wilful trespass, not in the performance of any duty to, or of any act authorized by defendant, and that defendant was not liable. (*Isaacs* agt. *The 3d Ave. R. R. Co.*, 47 *N. Y.*, 122.)

19. In proceedings for the condemnation of lands, under the provisions of the act incorporating the B. and A. R. R. Co. Laws of 1836, chap. 242, and of 1843, chap. 169), judgment creditors were not required to be made parties. They are in no sense "owners." Upon the completion of the proceedings, and payment of the compensation to the owner, the company acquired the right to the possession and use of the lands free from all judgment liens. (*Watson* agt. *The N. Y. E. R. Co.*, 47 *N. Y.*, 157.)

20. Where the conductor upon a railroad has been instructed by the company to demand of every passenger a certain fare, and to remove from the car any passenger refusing to pay the same; if the company has not the right to demand the required fare, it is liable for any force used upon the person of a passenger in an attempt to execute such order; if it has the

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right to the fare and the conductor, acting in the performance of his duty, exceeds, through zeal or impetuosity of temper, the degree of force necessary and proper to accomplish the purpose of removal and injury results, the company is also liable. (*Johnson vgt. 2d Ave. R. R. Co., 47 N. Y., 274.*)

21. The question whether the act occasioning the injury was wilful and malicious, or was mistakenly conceived to be a necessary use of force to effect the removal, is a question of fact for a jury. (*Id.*)

See COMMON CARRIERS. (47 N. Y.)
 EMINENT DOMAIN. (*Id.*)
 NEGLIGENCE. (*Id.*)
 TOWN BONDING. (*Id.*)

22. In an action against a railroad company, to recover damages of the defendant, for causing the death of the plaintiff's intestate, a brakeman in its employ, by negligence, the defense was that the intestate was guilty of negligence, or want of care, which contributed to his death, in being absent from his post, at the time, and omitting to apply the brakes. And the evidence rendered it more than probable that but for such absence, his life would not have been endangered. Held that it was erroneous for the judge to leave it to the jury to determine whether the intestate being absent from his post, warming or enjoying himself by a fire, was guilty of contributory negligence; whether the absence of a caboose did not authorize him to leave his post, in a cold morning; and whether the train being on an ascending grade, he had not a right to suppose his services were not as likely to be called in request as they would be on a downward grade. (*Strong vgt. The Boston and Albany Railroad Co., 60 Barb., 30.*)

23. And that it being probable that the jury were influenced by these considerations, so submitted to them, it was a proper case for a new trial. (*Id.*)

24. The defendants owned and operated two trucks between Syracuse and Rochester, upon different routes, one of which (the Auburn route) was longer than the other, and upon which forty-five cents more was charged, for passenger fare, than was charged upon the shorter route (via Palmyra.) The plaintiff purchased a ticket at Syracuse, for Rochester, which had, upon the face of it, the words "via Palmyra," paying therefor the lesser fare, and got upon a train bound for

Rochester, by the Auburn route. Upon exhibiting his ticket, the conductor told him that he was on the wrong train; that he could not go to Rochester on that train unless he paid forty-five cents more; and that the ticket would carry him to F. (the next station) and no further. The plaintiff said he expected to go through on that train, and would not pay any more. The conductor thereupon marked the ticket, with his punch, and returned it to the plaintiff. He again came to the plaintiff and asked him if he was going to pay the additional forty-five cents, and being answered in the negative, he told the plaintiff he must get off at F., and on arriving there, ordered the plaintiff to leave the train, and upon his refusal, put him off the cars, as he was required to do, by his instructions. In an action to recover damages for such ejection, the referee reported in favor of the plaintiff, on the ground that the conductor, instead of punching the plaintiff's ticket, should have expelled him from the cars upon discovering that his ticket was by the other route, and his refusing to pay the additional fare. Held that this was erroneous. That the conductor was under no obligation to the plaintiff to eject him from the cars, at any time before he should arrive at the point to which he was entitled to travel, on his ticket, so long as he persisted in remaining on the train. (*Adwin vgt. The New York Central Etc. Railroad Co., 60 Barb., 590.*)

25. That the plaintiff having taken this train through his own fault or inattention, his voluntary continuance upon it, after being fully notified of the consequences, must be deemed an election, on his part, to abide by the regulation of the company, since it was one lawful and proper to be made and to enforce. (*Id.*)

26. A railroad company is chargeable under section 12 of the general railroad act (Laws of 1850, chap. 140), with services rendered on a quantum meruit, as well as for a stipulated price. (*Chapman vgt. Black River Railroad Company, 4 Lansing, 96.*)

27. The notice provided for by section 12 is in time, if served within twenty days after rendering the last day's service claimed. (*Id.*)

28. It may be served on the chief engineer of the road; the section upon which the work is performed being, nevertheless, under the immediate charge of an assistant engineer. (*Id.*)

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29. The conductor of an express train of cars may lawfully stop the train and expel a passenger who holds a ticket to a station between the place where fare is demanded and the first station at which the train, by the published time tables, is to stop, if such passenger refuse to pay the fare which, in addition to the sum paid for his ticket, would entitle him to ride to such latter station. And this is so, notwithstanding the train may occasionally stop at the station for which the passenger has a ticket, if at the time the fare is demanded, facts do not exist which call for its stoppage there. (*Fisk agt. Albany and Susquehanna Railroad Company*, 4 *Lansing*, 147.)

30. Where the conductor of a train of cars, in good faith, and without violence, expels a passenger, the railroad company is not liable for anything beyond the actual damages. (*Id.*)

See COMMON CARRIERS. (4 *Lansing*.)
CONTRACT. (*Id.*)
RAILROAD MUNICIPAL BONDS. (*Id.*)

RAILROAD MUNICIPAL BONDS.

1. The validity of an application to bond a municipal corporation for railroad purposes, under the act of 1869 (chap. 907, p. 1303), must be determined by the state of the law at the time it is made. (*People ex rel. Hoag agt. Pack*, 4 *Lansing*, 528.)
2. The statutes contemplate that the railroad company shall be incorporated before the proceedings can be lawfully taken; but do not require the fact to be proved before the judge, or stated with especial particularity in the petition. The statement that the company in view is a railroad company in this state, is sufficient. (*Id.*)
3. They reserve no authority to taxpayers for withdrawing their consent from the application. When once given according to the prescribed form, it becomes irrevocable when the proceedings are afterward instituted upon it. (*Id.*)
4. The county judge may (by express provision of law) allow new parties to the application; but he may not allow an applicant to withdraw his name from the petition. (*Id.*)
5. A town is not deprived of the power to invest its bonds in a railroad named in the petition by reason of the incorporation and partial construction of any other railroad which is not constructed in such town, and not in opera-

tion within its limits, and not taxed or upon its assessment roll. (*Id.*)

6. To conclude the person taxed as a subscriber to the petition, he must either subscribe the petition himself, or his name must be subscribed by some other person, by his direction and in his presence. (*Id.*)
7. It will not be presumed that a signature made by request, by a third person, was made in the presence of the party making the request. (*Id.*)
8. Joint owners or occupants, when taxed as a partnership, are within the terms of the act of 1871, "a tax-payer only." (*Id.*)

RATIFICATION.

See FRAUD. (46 *N. Y.*)
HUSBAND AND WIFE. (*Id.*)
STATUTE OF FRAUDS. (*Id.*)
PRINCIPAL AND AGENT. (47 *N. Y.*)
TENANTS IN COMMON. (*Id.*)
TRIAL. (*Id.*)

REAL PROPERTY.

See EASEMENT. (4 *Lansing*.)
PRIVATE WAY. (*Id.*)
SURFACE WATER. (*Id.*)

REAL ESTATE CONTRACT.

See PARTIES TO ACTIONS. (4 *Lansing*.)

REBELLION.

See CONTRACT. (4 *Lansing*.)

RECEIPT.

See EVIDENCE. (4 *Lansing*.)
JUDGMENTS. (*Id.*)

RECEIVER.

1. James M. Gano, a dentist of the city of New York, was appointed receiver in this action, to take charge of the property and effects of the defendant, which consisted of spool silks and skein silks, which was formerly the property of the plaintiff and defendant as copartners, and which silks were in cases like wardrobes, and contained in a part of the second floor of the building, 290 Broadway, N. Y., 8 feet by 36 feet in size. (*Corey agt. Long*, ante, 492.)
2. Under the order appointing the receiver he was authorized to sell the property at public or private sale, and upon a private sale thereof the receiver claimed to have received from all

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sources \$8,123 04-100 and to have paid out \$2,888 49-100. These expenditures included large payments for alleged services to deputy receivers, keepers, the plaintiff in the action, plaintiff's counsel and the receiver's counsel. The proceedings were concluded within about three or four months. (*Id.*)

3. On determining the only questions properly before the court, to wit; the extent of the powers of the receiver, the manner in which he discharged his duties, his charges therefor, the state of his accounts, the balance due by him and the relief to be granted to insure the payment of such balance; and on discussing and considering fully the powers and duties of receivers generally:

Held, that it was sufficient to say that upon his own showing, the receiver's conduct in this case had been reckless; that he had been unmindful of the solemn duty which he owed to the court that appointed him and to the interests of the parties and their creditors. His charges could not be indorsed as necessary expenditures in the proper execution of his trust, or under any order, or in the course and practice of the court. Their sanction would cast disgrace and reproach upon the administration of justice. (*Id.*)

4. A receiver who steps outside the order appointing him, and assumes the role of an actor without the consent of or notice to the parties or the court, must be taught that the law will hold him to a strict account, and that the court, on the final passage of his accounts, will not ratify any expenditure unless the same has been necessarily incurred for the benefit of the estate. (*Id.*)

See CREDITORS. (60 Barb.,)
ACTION. (4 Lansing.)

RECORD.

See FOREIGN JUDGMENT. (46 N. Y.)

1. The record of an assignment of a mortgage is constructive notice, as against a grantee of the mortgagor, that the mortgagee can no longer deal with the mortgaged interests; and a subsequent discharge or release of the lien of the mortgage executed by him is invalid. (*Belden* agt. *Meeker*, 47 N. Y., 307.)

2. Under the provisions of section 17, i. E. S., p. 750, a record of a conveyance duly recorded, or a transcript thereof duly certified, is made original and primary evidence, and may be introduced in evidence with the same.

effect as the original, and without proof of the loss or destruction of the latter. (*Clark* agt. *Clark*, 47 N. Y., 664.)

RECORDING.

See FORECLOSURE. (4 Lansing.)

RECORDS OF SUPREME COURTS.

See EVIDENCE. (4 Lansing.)
JUDGMENTS. (*Id.*)

RECOVERY OF PERSONAL PROPERTY.

See DAMAGES. (4 Lansing.)

RECOVERY OF REAL ESTATE.

See EJECTMENT. (4 Lansing.)

RECOVERY.

See JUDGMENT. (46 N. Y.)
PENALTIES. (*Id.*)
CONTRACT. (47 N. Y.)

REDEMPTION.

See CAUSE OF ACTION. (46 N. Y.)
MORTGAGE. (*Id.*)

REFEREE.

See APPEAL. (46 N. Y.)
COUNTER CLAIM. (*Id.*)
FINDINGS OF FACT AND LAW. (*Id.*)
TRIAL. (*Id.*)
COSTS. (47 N. Y.)
PRACTICE. (*Id.*)
TRIAL. (*Id.*)
REPORT OF REFEREE. (60 Barb.,)

REFERENCE.

See LIMITATION OF ACTIONS. (47 N. Y.)
APPEAL. (4 Lansing.)
EVIDENCE. (*Id.*)
PRACTICE. (*Id.*)

REFORMATION OF CONTRACT.

See MISTAKES OF LAW AND FACT. (4 Lansing.)

REFORMATION OF DEED.

1. To constitute a defense to an action of ejectment on the ground that the language and legal effect of a deed differs essentially from the intent of the parties, a case must be presented

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which would induce a court of equity to interpose and reform the defective instrument; not that it is absolutely necessary, in such a case, that a judgment reforming the instrument should be pronounced, if the defendant is content to waive, or does not demand, such full relief. For the judgment that he recover in the action is giving him the full effect, so far as the title to the premises in controversy is concerned, of a reformation of the deed. (*Cramer* *agt. Benton*, 60 *Barb.*, 216.)

2. But the court, before rendering such a judgment, should have before it the same facts and parties as would enable it to pronounce a decree for reformation (*Id.*)

See EJECTMENT. (60 *Barb.*,)
DEFENSES. (4 *Lansing.*)

REFORMED CHURCH.

See CONTRACT. (4 *Lansing.*)
RELIGIOUS CORPORATIONS. (*Id.*)

RESCISSION OF CONTRACT.

See ACTION. (4 *Lansing.*)
MISTAKES OF LAW AND FACT.
(*Id.*)
PRACTICE. (*Id.*)

RELIGIOUS CORPORATIONS.

See CORPORATIONS. (46 *N. Y.*)

1. An appeal from a subordinate to a higher tribunal of the reformed church, waives objection to the decree of the latter, for want of jurisdiction. (*Connitt* *agt. Reformed Protestant Dutch Church of New Prospect*, 4 *Lansing*, 339.)
2. A written declination, signed by different members of the consistory, or board of church officers, publicly read in presence of the congregation, by which they decline to act further as such officers, under the then present pastor of the church, succeeded by acts on the part of the remaining officers, of the authorities of the church, and of the officers declining, showing that the declination was not intended as a resignation, though exclaiming to act as officers for the time; and there being no act of conduct on the part of the corporation, or any of its members, or authorities, accepting it as such, until after the pastor had ceased to be such, and the declining members had resumed their duties as officers, is not to be construed as a resignation. Subsequent action of the consistory, in which the

declining members being a majority thereof, participated, is regular, and binding upon the church. (*Id.*)

See ADVERSE POSSESSION. (4 *Lansing.*)
CONTRACT. (*Id.*)

REMEDY.

See ELECTION OF REMEDIES. (46
N. Y.)
LANDLORD AND TENANT. (*Id.*)

REMITTITUR.

See APPEAL. (46 *N. Y.*)

REMOVAL TO U. S. COURT.

1. Where one of several defendants, at the time of the commencement of the action, resides in this state, his subsequent removal to another state, will not authorize the court, on his petition, to remove the cause into the United States courts. (*Dart* *agt. Walker*, *ante*, 29.)
2. Under the act of Congress of July, 1866, one of several defendants who was a citizen of another state at the time of the commencement of the action, may, on his petition, have the cause removed into the United States court, as to himself, where he can make it appear that the suit is one which "there can be a final determination of the controversy, so far as the petitioning defendant is concerned, without the presence of the other defendants as parties in the case." (*Id.*)
3. The act of congress of 1866, and amended in 1867, concerning the removal of causes from state courts, "at any time before the final hearing or trial of the suit," &c., is unconstitutional, and invalid as divesting the state courts of acquired jurisdiction in such cases, which by the judiciary act of congress of 1789, is made concurrent with the U. S. courts. (*Stephens* *agt. Howe*, *ante*, 134.)
4. And there is no power conferred by the constitution of the U. S., upon the federal government, to divest a state court of its jurisdiction acquired in such cases. (*Id.*)
5. The mandate of the act of congress of 1789, that where the proper steps are taken, which entitles defendant to the removal of a cause to the circuit court of the United States, the state court shall "proceed no farther in the cause," is obligatory as well upon a court of

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appellate as of original jurisdiction.
(*Holden vgt. Putnam Fire Ins. Co.*, 46 N. Y., 1.)

6. Upon an application to remove, it is necessary for defendant to show as well that the suit was commenced "by a citizen of the state in which the suit is brought," as that it was commenced "against a citizen of another state." A petition, therefore, stating that plaintiff "is a citizen," is insufficient. No legal presumption arises from it that he was a citizen at the time of the commencement of the action. (*Id.*)

REPEAL.

See STATUTES. (46 N. Y.)
COURT OF OYER AND TERMINER.
(47 N. Y.)
STATUTES. (*Id.*)

REPLEVIN.

See CONSTITUTIONAL LAW. (60 Barb.)
DAMAGES. (4 Lansing.)

REPORT OF REFEREE.

A report of a referee, directing that a public street be opened through property cannot be sustained; but the court may order a sale of lots, with a reserved lane or right of way, common to the lots sold. (*Scott vgt. Guernsey*, 60 Barb., 163.)

RES ADJUDICATA.

1. The fact of *res adjudicata* is not to be made out by inference. An estoppel requires strict proof. A fact cannot be held to have been adjudicated in a former suit, unless it so expressly appears by the record, or, at least, it is clearly shown by evidence *aliunde*, that it was determined. (*Bisell vgt. Kellogg*, 60 Barb., 617.)
2. When there is a trial by the court, the judge who tried the cause, being required, in settling the case, to specify the facts found by him, and his conclusions of law, the facts thus specified are conclusive upon the parties, if founded on sufficient evidence; and there is no reason why they should not be considered as *res adjudicata* for all purposes, the same as though contained in the original findings of the judge. (*Id.*)

See COURT OF APPEALS. (60 Barb.,)
OFFICE AND OFFICER. (*Id.*)

RESCISSION.

See CONTRACT. (46 N. Y.)

See VERNOL *vgt.* KEELER. (47 N. Y.)
CONTRACT. (4 Lansing.)
MISTAKES OF LAW AND FACT. (*Id.*)

RESERVATION.

See PRIVATE WAY. (4 Lansing.)
EASEMENT. (*Id.*)

RES GESTÆ.

See EVIDENCE. (60 Barb.,)

RESIDENCE.

See ASSESSORS. (4 Lansing.)
EXECUTORS AND ADMINISTRATORS.
(*Id.*)

RESIGNATION OF CONSISTORY.

See RELIGIOUS CORPORATIONS. (4 Lansing.)

REVENUE STAMPS.

1. Instruments requiring a revenue stamp, may, when unstamped, be stamped and used in evidence, in the absence of intent to defraud the revenue by omitting the stamp. (*Friend vgt. Thompson*, 4 Lansing, 489.)

REVOCAION.

See CONTRACT. (46 N. Y.)
TRUSTS AND TRUSTEES. (4 Lansing.)

REWARD.

1. A reward was offered and published by the plaintiffs, as follows: "\$5,000 reward will be paid for the arrest and conviction, or information leading thereto, of the person or persons who attempted to murder, and, did rob, the messenger of the American Merchant's Union Express Company, while crossing the railroad bridge at Albany, on Friday evening, Jan'y. 6, 1871. For the company, J. C. FAROO, Gen. Superintendent." (*Fargo vgt. Arthur*, ante, 193.)
2. After trial, conviction and sentence of the prisoner several persons claimed the award, in whole or in part. (*Id.*)
3. In an action of *interpleader* by the plaintiffs, *held*, that it is a case peculiarly proper for such an action. The plaintiffs are ready to pay to the persons lawfully entitled. Some of the defendants claim the whole; some claim an equitable distribution. It is evidently a case in which the matter should be adjusted in one suit, and in which the plaintiffs do not know, to

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whom they ought to pay the money. (Id.)

Held, also, that although the reward, strictly construed, might be considered in the alternative, as an offer of that amount for two distinct acts each—for the arrest and conviction, or information leading thereto, yet a paper like this ought to be obtained as the public, to whom it was addressed, would understand it, for \$5,000, only. (Id.)

4. Practically, in this case, it appears that it was the information furnished by many parties, which led to the result—not a repetition of the same information, but information of independent facts. And upon the principle that "where there is one individual who gives information that is of itself useful, but that several persons give different pieces of information, the whole combined leads to the apprehension and conviction of the offender," it is a proper case for an equitable distribution of the award among the claimants entitled thereto. (Id.)

RIGHT OF WAY.

See EASEMENT. (4 *Lansing*)
PRIVATE WAY. (Id.)

RIPARIAN OWNER.

See SURFACE WATER. (Id.)

RIPARIAN PROPRIETOR.

See WATER COURSE. (46 N. Y.)

RIVERS.

See NAVIGATION. (46 N. Y.)
See PUBLIC COURSE. (4 *Lansing*)

ROADS.

See HIGHWAYS AND BRIDGES. (4 *Lansing*)

RULES OF COURT.

1. It is an excuse for the non-service of copies of the case, as required by rule seven of this court, that appellant has not caused a return to be made and filed, as required by rule 2. (Sage vgt. *Voluntarily*, 46 N. Y., 443.)

S.

SAILING VESSELS.

See NAVIGATION. (46 N. Y.)

SALE.

See STATUTE OF FRAUDS. (46 N. Y.)
STOCK BROKER (Id.)
VENDOR AND VENDEE. (Id.)

SALE OF CHATTELS.

1. Manufacturers of cast-steel sold steel, for axes, to the defendants, "The Morris Axe and Tool Company," which they warranted equal in quality to the best English brand:

Held, that the warranty implied that the steel was equal to the best English brand for the manufacture of axes. (Part vgt. *Morris Axe and Tool Company*, 4 *Lansing*, 103.)

2. *Held*, further, that the name of the defendant was notice to the vendors of the uses to which the steel was to be applied. (Id.)

3. The plaintiffs, manufacturers at Gt., offered to manufacture and forward to the defendants, merchants at P., certain qualities and quantities of gloves, and, without agreement for their purchase, forwarded the gloves, as offered, to the defendants, with an invoice. The defendants opened the package, compared the goods with the invoice, and marked the cost on the separate packages, but afterward sent word to the plaintiffs declining to purchase at their price, and offering less, but in the meantime a pair of the gloves were sold by the defendant's clerk, and then, without fault of defendants, the gloves were burned with their store:

Held, that aside from the question of their diligence in notifying the plaintiffs of their determination not to buy, the defendants made the gloves theirs by assuming to sell and deliver the single pairs of them; that the defendants were bound to regard the proposition for sale as entire; and that the plaintiffs could recover the value of the gloves. (Babcock vgt. *Hutchinson*, 4 *Lansing*, 276.)

See CONTRACT. (4 *Lansing*.)

SALE OF LANDS.

See EVIDENCE. (4 *Lansing*.)
LOAN COMMISSIONERS. (Id.)
PARTIES TO ACTION. (Id.)

SANITY AND INSANITY.

See INSURANCE. (4 *Lansing*.)

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SATISFACTION OF MORTGAGES
AND JUDGMENTS.

See EXECUTORS AND ADMINISTRATORS.
(4 *Lansing*.)
JUDGMENTS. (*Id.*)

SCHEDULE OF INSOLVENT'S
DEBTS.

See INSOLVENCY. (4 *Lansing*.)

REDUCTION.

1. In action by a father, to recover damages for the seduction of his daughter, evidence of a promise of marriage, made by the defendant to the daughter, previous to the seduction, is inadmissible. (*Whitney* *vs.* *Elmer*, 60 *Barb.*, 259.)

2. If such evidence is offered in chief, by the plaintiff, and admitted as general evidence in the cause, without qualification or limitation, it is cause for reversal. (*Id.*)

SEWERS.

See NEW YORK CITY. (46 *N. Y.*)

SEPARATE ESTATE OF MARRIED
WOMEN.

1. A married woman may not charge her separate estate with liability from which it derives no benefit, without a written instrument expressing such an intention. (*Shorter* *vs.* *Nelson*, 4 *Lansing*, 114.)

2. A husband, acting as general agent with reference to his wife's separate real property, informed the plaintiff of her ownership of separate real estate, and induced him to credit her with goods and services for his (the husband's) individual benefit:

Held, that the wife's estate was not charged, and that this was so notwithstanding the plaintiff had, while furnishing the goods, been told by the wife that they were for her, and should be paid for out of her separate estate. (*Id.*)

See HUSBAND AND WIFE. (4 *Lansing*.)

SERVICE.

See EVIDENCE. (4 *Lansing*.)

SET OFF.

See TRUSTS AND TRUSTEES. (4 *Lansing*.)

SHADE TREES.

See HIGHWAYS AND STREETS. (4 *Lansing*.)

SHERIFF.

See JURISDICTION. (46 *N. Y.*)
See PRACTICE. (60 *Barb.*)
EXECUTION. (4 *Lansing*.)
NE EXEAT. (*Id.*)
ORDER OF COURT. (*Id.*)

SHIPPER.

See CONTRACT. (4 *Lansing*.)

SLANDER.

1. In an action of slander, the plaintiff, as a witness on his own behalf, stated, on cross-examination, that he had had litigation with the defendant. He was then asked how many suits he had had with him, and for what causes of action?

Held, that the court below properly excluded so much of the inquiry as related to the causes of action. It was in no way material or pertinent to the issue. Its materiality consisted solely in its bearing upon the credit due to the plaintiff as a witness, and was therefore collateral in its nature. The end of such an inquiry would result in an unlimited examination of the previous litigation, and in attempts to indicate the different positions occupied by the parties engaged in it. (*Boynston* *vs.* *Boynston*, ante, 380.)

2. To the question, whether the plaintiff had not previously sued the defendant for slander and recovered only \$10:

Held, that this was included in that portion of the previous question which the court rejected as improper. That the remarks on that exception was equally applicable to the exception taken to the exclusion of this inquiry. (*Id.*)

3. Where on the trial there is a variance between the evidence and the complaint which the court is authorized to disregard, it will be disregarded unless the defendant proves that he has been misled to his prejudice. (*Id.*)

See LIBEL. (46 *N. Y.*)

SOLDIERS' BOUNTY.

See PARENT AND CHILD. (4 *Lansing*.)
TOWNS. (*Id.*)

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SPECIAL ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.
(4 *Lansing*.)

SPECIAL PARTNERSHIP.

See PARTNERSHIP. (4 *Lansing*.)

SPECIAL VERDICT.

See EJECTMENT. (4 *Lansing*.)

SPECIFIC PERFORMANCE.

1. A condition precedent must be strictly performed, and if a person by contract, engages to perform an act, performance is not excused by inevitable accident. (*Crane* agt. *Kaibel*, ante, 389.)
2. So where the time for the payment of money is to happen after the performance of that which is the consideration, no right of action accrues for the money until the consideration is performed. (*Id.*)
3. Substantial performance is not enough where the person, for whom the work was done, has neither voluntarily accepted it, nor waived a faithful performance of the contract. (*Id.*)
4. A party may retain without compensation, the benefits of a partial performance, where from the nature of the contract he must receive such benefits in advance of a full performance, and by its terms or just construction he is under no obligation to pay until the performance is complete. (*Id.*)
5. In relation to a builder's contract, where the builder has in part performed his contract and furnished materials which have been placed in the building, such materials become annexed to the soil, and thereby the property of the owner of the soil. And the law does not adjudicate that a mere silent occupation of the building thereafter by the owner amounts to a waiver of the contract, nor does it deny to him the right so to occupy and still insist upon the contract. (*Id.*)
6. In this case, which arose under a builder's contract made in the usual manner by agreement to pay, by the owner to the contractor, specific separate payments as the work progressed and was completed as specified in the contract:

Held, on a call upon the owner for the fifth payment under the contract, that the evidence fell far short of proving

that the defendant (owner) had accepted the work actually done as a full performance under the contract, which was required as a condition precedent to such payment, or that the defendant had waived a strict performance of the contract. (*Id.*)

7. Plaintiff purchased certain real estate at an auction sale, paying ten per cent. of the purchase-price. The usual memorandum of sale was signed by him and the auctioneer. At the place and shortly before the time agreed upon, for the payment of the balance of the purchase-money, he tendered vendor's agent a check for the amount, which the agent refused, unless certified, but permitted plaintiff to go for the certification, and with the impression that the certified check would be received at any time during the day. Plaintiff returned about two hours after the time fixed for the performance, with the check duly certified, which he tendered and demanded the deed. This was refused, upon the ground that the time for the performance had passed. The lands were the same day conveyed to a third person, who had full knowledge of all the facts. In an action for specific performance against the vendor and subsequent purchaser, the complaint in which set up a contract of sale, which was admitted by the answer:

Held, 1st. Defendants having admitted contract, and not having pleaded the statute of frauds, are deemed to have renounced the benefit of it.

2d. Performance at the precise time was waived, and vendor was estopped from claiming that the right to perform was lost by lapse of time.

3d. The tender not having been refused because not in money, the right to demand money was waived.

4th. The subsequent purchaser took title subject to the equities of plaintiff, and was properly required to convey to him. (*Duffy* agt. *O'Donovan* et al. 46 N. Y., 223.)

See GARRETT agt. SCHREFFER (mem.) (47 N. Y.)

See PARTIES TO ACTION. (4 *Lansing*.)

STAMPS.

1. It is not within the constitutional power of congress to prescribe for the states a rule for the transfer of property within them. A deed, therefore, is not invalid because not duly stamped. (*Moor* agt. *Moor*, 47 N. Y., 467.)

See REVENUE STAMPS. (4 *Lansing*.)

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STANDING WATER.

See SURFACE WATER. (4 *Leasing*.)

STATE COURTS.

See DIVORCE. (4 *Leasing*.)

STATUTES.

1. Sec. 1 of chap. 217, laws of 1866, extending the term of the incumbents of the office of justice and clerk of the district court of the eighth judicial district, in the city of New York, is in conflict with sec. 18 of art. 6, of the constitution of 1846, and is void. That sec. 2 of said act, appointing a different time for the election of said officers, from that prescribed by the act creating the offices (chap. 300, laws of 1860), repeals so much of the latter act, and an election under it is invalid. (*The People ex rel. agt. Bull*, 46 N. Y., 57.)
2. Neither the provisions of the act of 1869 (chap. 272, laws of 1869), authorizing the towns of Yonkers and East Chester, in the county of Westchester, to make and improve several highways, &c., nor the act of 1870 (chap. 340, laws of 1870), amending the same, are in violation of sec. 13, art. 7 of the constitution, which directs, that every act imposing a tax shall distinctly state the tax, and the object to which it is to be applied. Those acts recognize a distinction between the "road" and the bridges, provision is made for the raising of money by the issue of bonds, &c., to pay for the former, and the amount is limited. But no provision is made to pay for the latter; and the issue of bonds for that purpose could not be required. (*The People ex rel. agt. Flagg*, 46 N. Y., 401.)
3. The commissioners appointed under said act of 1869 are authorized to construct the roads therein specified, and to require the issue of bonds to pay therefor, without waiting for the confirmation of the report of the four additional roads specified in the act of 1870. (*Id.*)
4. Statutes conferring exemptions from taxation are to be strictly construed. (*B. C. Cemetery agt. City of B.*, 46 N. Y., 506.)
5. The provision of sec. 10 of the act providing for the incorporation of rural cemetery associations (chap. 133, laws of 1847), which exempts the lands and property of such associations from "all public taxes, rates and assessments," does not apply to a municipal assessment to defray the expenses of a local

improvement. Public taxes, rates and assessments are those which are levied for some public or general use or purpose, in which the person assessed has no direct, immediate and peculiar interest. Those charges and impositions which are laid directly upon the property in a circumscribed locality, to effect some work of local convenience, beneficial to the property especially assessed for the expense of it, are not public, but are local and private, so far as this statute is concerned. (*Id.*)

6. Statutes delegating the right of eminent domain to railroad and other corporations for public use, being in derogation of common right, are not to be extended by implication, and must be strictly complied with. Yet they are not to be construed so literally, as to defeat the purposes of the legislature. The powers granted will extend no farther than is expressly stated in the act, or than is necessary to accomplish its general scope and purpose. If there remains a doubt as to the extent of the power, after all reasonable inferences in its favor, the doubt will be served adversely to the claim of power. (*La re N. Y. & H. R. R. Co. agt. Rip*, 46 N. Y., 545.)

See CORPORATIONS. (46 N. Y.)

LIMITATION OF ACTIONS. (*Id.*)
NEW YORK CITY. (*Id.*)

7. Under the provisions of section 4, of chapter 307, Laws of 1862, entitled "An act to prevent and punish the use of false stamps, labels or trade marks," as amended by section 2, of chapter 209, Laws of 1863, to render a person liable to the penalty therein prescribed, the act complained of must have been done with intent to defraud some person or persons, or some body corporate. (*Low agt. Hall*, 47 N. Y., 104.)
8. The act "to confirm certain ancient conveyances and directing the manner of proving deeds to be recorded," passed February 19th, 1771 (2 *Van Schaick*, 611), does not recognize or affirm the right of a *feme covert* to appoint or act by an agent or attorney or ratify or validate deeds or grants made in her behalf by an agent or attorney. (*Hardenburg agt. Lakin*, 47 N. Y., 109.)
9. The acts supplemental and amendatory thereto, passed March, 1773, (2 *Van Schaick*, 765), only gave effect to such deeds executed after February 16, 1771.
10. The conductor of a street railroad car is not the driver of a "carriage,"

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- within the meaning of section 6, 1. R. S., 636, which makes the owners of carriages running upon the highway for the conveyance of passengers, liable for all injuries and damages done by a driver while driving such carriage, whether the act was wilful or negligent. (*James agt. The 3d Av. R. R. Co.*, 47 N. Y., 122.)
11. In proceedings for the condemnation of lands, under the provisions of the acts incorporating the B. and A. R. R. Co. (Laws of 1837, chapter 242, and of 1843, chapter 169), judgment creditors were not required to be made parties. They are in no sense "owners." Upon the completion of the proceedings and payment of the compensation to the owner, the company acquired the right to the possession and use of the lands, free from all judgment liens. (*Watson agt. the N. Y. C. & H. R. Co.*, 47 N. Y., 157.)
12. By the act of 1843, the vice-chancellor was substituted for the county judge, as the officer before whom the proceedings were to be had. (*Id.*)
13. Under the act to provide for the liquidation of claims against "The Evergreens" (a rural cemetery association), and for a sale of its real estate to pay its debts (chapter 710, Laws of 1866), and of the act amending the same (chapter 374, Laws of 1870), proceedings were instituted and prosecuted to judgment directing sale, and the same had been advertised for sale by the referee; on the 12th April, 1871, and before the sale, the general act authorizing the sale of the unoccupied lands of burial grounds and rural cemetery associations (chapter 479, Laws of 1871), was passed.
- Held*, that an intent to repeal the former acts, and to abrogate the proceedings under them, would not be adopted by implication, nor from general or equivocal words, and that said acts were not repealed by the general repealing clause in section two of the latter act. (*In re The Evergreens*, 47 N. Y., 216.)
14. In an action brought to recover damages for the death of a child three years old, under the provisions of chapter 450, Laws of 1847, as amended by chapter 256, Laws of 1849, the absence of proof of special pecuniary damage resulting from the death of the child will not justify the court in nonsuiting the plaintiff or in directing the jury to find only nominal damage. (*Id.* agt. *The Forty-second Street and G. S. F.*, B. R. Co., 47 N. Y., 317.)
15. A statute should not be so construed as to work a public mischief unless required by words of the most explicit and unequivocal import. In the construction of statutes, effect must be given to the intent of the legislature whenever it can be discerned, though such construction seem contrary to the letter of the statute. Words absolute in themselves, and language the most broad and comprehensive, may be qualified and restricted by reference to other parts of the same statute to other acts, *in pari materia*, passed before or after, or to the existing circumstances and facts to which they relate. So, also, contemporaneous legislation, although not precisely *in pari materia*, may be referred to for the same purpose. Statutes enacted at the same session of the legislature should receive a construction if possible which will give effect to each. A clause in a statute purporting to repeal prior statutes is subject to the same rules of construction, and, although general and unqualified, if an intent appear to give the language a qualified or limited sense, the intent must prevail over the literal interpretation. (*G. H. Smith agt. The People*, 47 N. Y., 330.)
16. Under the foregoing rules:
- Held*, that those portions of the acts of 1853 and 1857 (chapters 217 and 382, Laws of 1853, and chapter 446 Laws of 1857), amending the charter of the city of New York, permitting courts of oyer and terminer in and for the city of New York to be held by a justice of the supreme court alone, were not repealed by the general repealing clause in the "Act to reorganize the local government of the city of New York." (§ 126, chap. 132, Laws of 1870.) (*Id.*)
17. At common law the husband had the right of administration, and through administration he acquired the title to the personal property of his deceased wife not reduced to possession during coverture, subject only to the payment of her debts. These rights were preserved by the Revised Statutes (2 R. S., § 75, § 22; p. 96, § 79), and have not been affected by the statutes of 1848 and 1849 in relation to married women. These statutes give the wife control of her separate estate, with power of testamentary disposition, during her life; but, if she dies intestate, the rights of her husband, as her successor, are not affected, and he is not prevented from administration, and consequent enjoy-

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- ment of the property. (*Barnes* agt. *Underwood*, 47 N. Y., 351.)
18. The amendment of the 79th section of the statute of distributions, in 1867, did not affect the right of the husband to administration and enjoyment of his deceased wife's personal estate, except in the case therein specified, of her dying, leaving descendants. (*Id.*)
19. The provision of the act of 1823 (43, chap. 242, Laws of 1823), requiring the comptroller to publish notices stating when the time for the redemption of lands sold for taxes would expire is peremptory. (*Westbrook* agt. *Wiley*, 47 N. Y., 457.)
20. The subject expressed in the title of the act entitled "An act to make provisions for the government of the county of New York" (chapter 875, Laws of 1869), embraces the raising and appropriating of money, the imposition of taxes to defray the expenses of the government of the county, and also a consideration of the property to be taxed. The provision, therefore, of section 2 of that act, which provides that the real estate of the New York Hospital, except buildings which are actually used for hospital purposes, shall be liable to taxation the same as other property, is not in contravention of section 16, article 3 of the constitution, and is effectual to modify and restrict the exemption contained in the act of 1822. (*People ex rel. agt. Commissioner of Taxes*, 47 N. Y., 301.)
21. The omission, in stating the corporate name, of the prefix "The society of," is not a material variance, where it is not shown that there is any other hospital having property in the city of New York exempt from taxation, to which the name in the act could apply. (*Id.*)
22. In proceedings under title 1, chapter 20, part 1 of the Revised Statutes (1 R. S., 614), for the relief and support of indigent persons, the court of sessions is authorized by section 4, in case one of two persons equally liable is unable to contribute his entire proportion of such support, to require him to contribute according to his ability, and to require the other to pay the residue. (*Stone* agt. *Burgess*, 47 N. Y., 521.)
23. Section 2 of the "Act concerning the rights and privileges of persons in the military and naval service of the United States" (chapter 578, Laws of 1864) is not retroactive; and the time of absence of a person in such service, prior to its passage, is not excluded in calculating the time limited for the commencement of an action. (*Stone* agt. *Flower*, 47 N. Y., 506.)
24. The provisions of the act to authorize the election of an additional justice of the peace in the city of Brooklyn. &c. (chapter 699, Laws of 1868), do not authorize the appointment of a clerk for the court of said justice. In any case the concurrence of the mayor of the city is necessary to the valid appointment of a clerk. (*Cassidy* agt. *City of Brooklyn*, 47 N. Y., 659.)
- See APPRAISE. (47 N. Y.)
 CODE OF PROCEDURE. (*Id.*)
 CONSTITUTIONAL LAW. (*Id.*)
 HUSBAND AND WIFE. (*Id.*)
 LIMITATION OF ACTIONS. (*Id.*)
 LITERARY PROPERTY. (*Id.*)
 NEW YORK CITY. (*Id.*)
 RECORDS. (*Id.*)
 TOWN BONDING. (*Id.*)
 TRUSTS. (*Id.*)
25. A statute authorizing the election of an additional justice of the peace in a city, conferred upon the justice to be elected thereunder, jurisdiction in all civil and criminal cases, and over all persons arrested or charged with any offenses, and all the jurisdiction, power and authority in such cases, which were possessed by the justices in said city then in office; and provided that all laws governing the justices of the peace in said city should apply to, and be binding upon, said justice; but made no provision for a clerk. Held that no power to nominate or appoint a clerk was granted by the statute, and that the court could not extend the statute by construction. (*Cassidy* agt. *The City of Brooklyn*, 60 Barb., 105.)
26. A subsequent statute devolved the power of appointing clerks of justices of the peace upon the common council. The charter of the city provided that the mayor and board of aldermen, together, should form the common council, and that all ordinances and resolutions passed by the board of aldermen must be presented to mayor for his approval. Held that the concurrence of the mayor was requisite to a valid appointment of a clerk. (*Id.*)
- See ASSESSMENTS. (60 Barb.)
 BENEVOLENT SOCIETIES. (*Id.*)
 CONSTITUTIONAL LAW. (*Id.*)
 CORPORATIONS. (*Id.*)
 CRIMINAL LAW. (*Id.*)
 INJUNCTION. (*Id.*)

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INTERNAL REVENUE ACT- (*Id.*)PRACTICE. (*Id.*)TRUSTS, &c. (*Id.*)USURY. (*Id.*)WILLS. (*Id.*)

CONSTRUCTION OF CERTAIN STAT-

UTES. (*4 Lansing.*)PARTNERSHIP. (*Id.*)PENALTY. (*Id.*)

STATUTE FORECLOSURE.

See FORECLOSURE. (*4 Lansing.*)REVENUE STAMPS. (*Id.*)

STATUTE OF FRAUDS.

1. Where the defendant, in possession of real estate, under a contract to purchase the same of the owner—having made partial payments on the consideration price and made improvements upon the premises, enters into a parol agreement with the plaintiff for an advance of money to enable him to pay up the purchase price of the premises to the owner, that the plaintiff as his security is to take the legal title from the owner, and to execute a written agreement to the defendant to convey to him the title on payment by the defendant of such advance with interest, at a specified time, which parol agreement is fulfilled so far as the defendant is concerned, by having the deed made, executed and delivered to the plaintiff, on receiving such advanced sum; and the plaintiff thereupon refuses to execute and deliver to the defendant the writing declaring the right of the defendant under the parol agreement, but sets him at defiance, and commences an action of ejectment against him to recover possession of the premises:

Held, that so gross a fraud ought not to be permitted, and that the principles upon which courts of equity enforce agreements that have been in part performed are an adequate protection to the defendant. (*Dodge* *agt. Welman*, *ante*, 427).

2. There is nothing in the statute of frauds which in any degree interferes with the equitable jurisdiction of a court of equity in such cases, but on the contrary, either with or without the saving clause in the statute (in reference to agreements for the sale of lands, &c., to be in writing, &c.) the court always prevents the use of the statute as a cover and protection to the fraudulent party. (*Id.*)

3. R., a broker, offered to defendants ten casks of prunes, which they agreed, orally, to take. R. executed and de-

livered to plaintiffs a bought note in defendants' name for the prunes, and received from plaintiffs a warehouse delivery therefor, which order he delivered to defendants, who received and retained it and requested R. to sell the goods for them. The ten casks had been separated and weighed to plaintiffs and were all they owned at the warehouse, on which the delivery order was given:

Held, that the action of defendant's was an adoption and ratification of the acts of R.; and the signature and delivery by him of the bought note, made a valid contract for the sale of the goods within the statute of frauds. Also, that there was a sufficient delivery to charge defendants and maintain an action for goods sold and delivered. (*Hastings* *agt. Baker*, 46 N. Y., 666.)

See CONTRACTS. (46 N. Y.)VENDOR AND VENDEE. (*Id.*)

4. No act of the vendor alone, in performance of a contract of sale void by the statute of frauds, can give validity to such a contract. When no part of the price is paid by the vendee, there must not only be a delivery of goods by the vendor, but a receipt and acceptance of them by the vendee, to pass the title or make the vendee liable for the price; and such acceptance must be voluntary and conditional. Some act or conduct on the part of the vendee, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract. (*Caulkins* *agt. Hellman*, 47 N. Y., 449.)
5. Evidence of a bona fide attempt upon the part of the vendee, immediately upon receipt and examination of the goods, to communicate to the vendor a message declining to accept, is proper, as part of the *res gesta*, and material as qualifying the act of receiving and retaining the goods, and rebutting the presumption of acceptance arising therefrom, although such message was never received by the vendor. (*Id.*)
6. The provisions of the statute in reference to fraudulent conveyances and contracts in reference to lands (title 1, chapter 7, part 2, of the R. S.) do not preclude a party from establishing an implied or resulting trust recognized by the common law. The transaction, out of which a trust of this character arises, may be proved by parol; but the trust itself must rest upon the acts or situation of the parties as

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proved and not merely upon their declarations. (*Vote agt. Bryant, 47 N. Y., 544.*)

See GARRETT agt. SCHEFFER (mem.) (47 N. Y.)

CHAPMAN agt. MCKAY (mem.) (*Id.*)

STATUTE OF LIMITATIONS

- 1 Where payments are made upon a promissory note, given by the defendant to the intestate in his life time, to his widow having possession of the note, before letters of administration are granted to her, on the granting of such letters subsequently to her, the doctrine of *relation*, from the death of the intestate confirms her acts made for the benefit of the estate and renders the payments thus made a *new promise* and takes the note out of the statute of limitations. (*Townsend agt. Ingersoll, ante, 276.*)

See LIMITATION OF ACTIONS. (47 N. Y.)

- 2 Where the defendant entered into an agreement under seal, in Massachusetts, for the immediate payment of money, and afterward removed into this state, in an action by the party entitled (a resident of Massachusetts), it seems the statute of limitations is not a bar until twenty years after the defendant's removal here. (*Hall agt. Robbins, 4 Lansing, 463.*)

STATUTE OF USES AND TRUSTS

See LIEN. (46 N. Y.)

STEAMBOAT COMPANIES.

1. A steamboat company is liable, as a common carrier, for the loss of baggage of a passenger stolen or robbed in the night time from the state room occupied by him and for which he has paid, there being no negligence on his part; al though the baggage is such as the passenger may choose to retain upon his person or in his own custody—such as a pocket book, money, watch and chain, &c. (*Crozier agt. Boston, N. Y. &c., Steamboat Co, ante, 466.*)
2. The rule requiring such baggage to be specially delivered into the custody of an officer of the boat, in pursuance of a printed notice posted up, is inapplicable to a passenger occupying a state room on a steamboat. (*Id.*)

STIPULATION.

See EJECTMENT. (4 Lansing.)
SUPERVISORS. (*Id.*)

STOCK BROKERS.

1. Defendants, stock brokers in the city of New York, purchased for plaintiff certain stocks, under an agreement that they were to advance the money for the purchases, and he to keep with them a margin or security satisfactory to them. A portion of the stock was sold by defendants without giving plaintiff notice of the time and place of sale. Plaintiff repudiated and disavowed the sale. Defendants acceded to such disavowal and notified plaintiff, they would not consider the sale as made on his account, but on their own; and by both parties it was subsequently treated as a nullity as between them. After that, defendants notified plaintiff to furnish additional margin; and upon his failure so to do, and in the afternoon of the twenty-eighth April, served upon him personally, a notice that unless a satisfactory margin was furnished, or the balance of his account paid, his stocks would be sold at public auction, upon the thirtieth April, at 12.30 P.M., at a place designated; and the stocks were sold in accordance with the notice:

Held, that plaintiff had waived his right to recover as for a conversion of the stocks sold at the first sale. That his default in furnishing a satisfactory margin, or paying the balance of the account, entitled the defendants to enforce their lien by the sale of the stock, and that the parties living in the same city, the notice of sale was a timely and reasonable one, and the sale legal. (*Stewart agt. Drake, 46 N. Y., 449.*)

STOCK HOLDERS.

See CORPORATION. (46 N. Y.)
ACTION. (4 Lansing.)
CORPORATION. (*Id.*)
MANUFACTURING CORPORATION. (*Id.*)

ST. LAWRENCE RIVER.

See FEDERAL COURTS. (4 Lansing.)

STREET OPENING.

See NEW YORK CITY. (4 Lansing.)

STREETS.

1. A defective and dangerous cross-walk in a street in the city of Lockport, whereby a citizen sustained personal injuries, was presumptively a construction by the city. But if it was not, it was an obstruction in a public highway, the duty to keep which in a pro-

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per and safe condition devolved upon the city. (*Walker* *agt. The City of Lockport*, ante, 356.)

2. Express notice of the dangerous condition of a cross-walk or a street is not necessary to be given to the city authorities, where ample time has elapsed to render the condition notorious. (*Id.*)

See HIGHWAYS. (46 N. Y.)
ASSESSMENTS. (60 Barb.,)
LOCKPORT, (CITY OF.) (*Id.*)
MUNICIPAL CORPORATIONS. (*Id.*)
TROY, (CITY OF.) (*Id.*)
HIGHWAYS AND STREETS. (4 *Law-
ing.*)
NEW YORK CITY. (*Id.*)

SUBMISSION OF CONTROVERSY.

1. A case submitted under section 372 of the Code should present only questions of law. (*Clark* *agt. Wise*, 48 N. Y., 612.)
2. Where all the facts upon which the controversy depends, and which are necessary to give ground for a conclusion of law are not stated, the court cannot pronounce the judgment desired. (*Id.*)
3. An infant cannot, by himself or by his guardian, submit a controversy, under sec. 372 of the Code. (*Lathers* *agt. Fish*, 4 *Lawing* 218.)

SUBSTITUTE.

See TOWNS. (46 N. Y.)

SUICIDE.

See INSURANCE. (4 *Lawing.*)

SUMMARY PROCEEDINGS
AGAINST TENANT.

See EVIDENCE. (4 *Lawing.*)
LANDLORD AND TENANT. (*Id.*)

SUPERVISOR.

1. After the term of office of a supervisor has expired, and another person has succeeded to the office, a writ of *mandamus* will not lie to compel the former to meet and account with the justices and town clerk of the town, under the provisions of the Revised Statutes (1 E. S., 243, § 4). (*The People* *agt. Martin*, ante, 52.)
2. The remedy of the town is by action upon the supervisor's bond—or by action in the supreme court in the name of the town, under chap. 834, laws of 1866, to compel them to account, and for the recovery of any money or

property of the town which he has not duly accounted for. (*Id.*)

3. *Mandamus*, does not lie when other legal remedies afford adequate redress. (*Id.*)

See BOARD OF SUPERVISORS. (46 N. Y.)

4. County supervisors may compromise and settle a judgment recovered by them for the county, pending an appeal therefrom. (*Board of Supervisors of Orleans County* *agt. Brown & Lansing*, 23.)

SUPPLEMENTARY PROCEEDINGS

1. An injunction order only affects property received, earned or due the judgment debtor before the making of the order. (*Atkinson* *agt. Shreve*, ante, 84.)
2. Where the judgment debtor borrowed \$100, to pay his rent, after the injunction order in supplementary proceedings was made, but did not pay his rent until after it was served upon him:

Held, that he was not in contempt for disobeying the order. (*Id.*)

3. Where proceedings are instituted, under section 294 of the Code, to reach a debt claimed to be due the judgment debtor, if the debt is denied, a judge has no authority to decide summarily the question of the indebtedness, and to compel its payment. The debt is only recoverable, as provided in section 299, in an action against the person or corporation claimed to be owing it, brought by a receiver. (*West Side Bank* *agt. Fugley*, 47 N. Y., 368.)

4. By the provisions of section 427, which authorizes a judge to order any property of the judgment debtor due to him to be applied to the satisfaction of the judgment, and by section 302, which provides that a person disobeying an order of a judge may be punished as for contempt, it was not intended to revive the remedy of imprisonment for debt, and under them a judge has no authority to direct the imprisonment of one owing a debt to a judgment debtor, and who is unable or declines to pay. (*Id.*)

5. The word "property," as used in section 297, does not include debts, but is limited to goods or specific money; and when these belong indisputably to the judgment debtor, a refusal to deliver them over as ordered would be a willful contempt, and punishable as such. (*Id.*)

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SUPREME COURT.

1. The supreme court is not limited to punishment by fine and imprisonment, in enforcing obedience to its orders; but it has control over its own proceedings and can refuse the benefit of them to the party in contempt when asked as a favor, and can prevent him from taking any aggressive proceedings against his adversary; but it has no power to stay him in his proceedings, by motion or appeal, where the object is to rid himself of the alleged contempt, or show that the order which he did not obey was erroneous. (*Brinkley* agt. *Brinkley*, 47 N. Y., 40.)

See APPEAL. (4 *Lansing*.)
ORDER OF COURT. (*Id.*)

SURETY.

See PRINCIPAL AND SURETY. (4 *Lansing*.)

SURFACE WATER.

1. An owner of lands may not relieve them from standing water, or prevent its accumulation thereon, by discharging it through drains, or ditches, upon the land of his neighbor. (*Foot* agt. *Bronson*, 4 *Lansing*, 47.)
2. To relieve their lands from surface water, the defendants deepened a ditch upon the highway, and thus caused an increased and unnatural flow of water through the surface drains of adjacent owners, to the injury of their lands, and to the hazard of future injuries:
Held, that a mandatory injunction should issue to compel the filling of the ditch to its former level, and to restrain the defendants from lowering it again. (*Id.*)

SURPLUS MONIES.

1. On a reference to ascertain the rights of claimants to surplus monies in a mortgage foreclosure case, the claimants are entitled to the fees of the referee and fees of the clerk in the proceeding. (*Haell* agt. *Robbins*, ante, 108.)
2. The only costs, aside from disbursements, that can be allowed the claimants, at the rate allowed for similar services in civil actions, are such as are prescribed by the Code. (*Id.*)
3. In this case, the claimants are entitled to costs for two motion fees of \$10 each. One for the appointment of

the referee and the other for the confirmation of his report. (*Id.*)

4. It seems, that there may be cases in which it would be proper to allow a trial fee, before the referee. These are special proceedings and costs may be allowed in the discretion of the court. (*Id.*)
5. A widow who elects to take and accepts a gross sum from surplus moneys paid into court under a judgment of foreclosure, in lieu of her dower right, is entitled to the full sum accepted, free from any costs or commissions on a reference in obtaining it. (*Campbell* agt. *Erving*, ante, 256.)
6. A lessee for years of mortgaged premises, holding under a lease containing a covenant of quiet enjoyment, upon foreclosure and sale under the mortgage, is entitled to receive out of the surplus moneys, the value of the use of the premises for the remainder of his term, less the rents reserved and other payments to be made by him under the lease. (*Gurdon* agt. *Shidmore*, 46 N. Y., 297.)
7. By being made a party to the foreclosure suit, he is not concluded as to the value of the fee, by the amount the premises brought at the sale; nor is he limited to a percentage thereon in fixing the rental value. The right granted to the lessee by the lease is an interest in the premises, capable of being sold and transferred, and has precedence of the estate of the lessor, and is an encumbrance upon the land to the extent of the lessor's interest. The lessee having this right of priority over the lessor, is interested only, in seeing that the property produces sufficient to cover his interest. He has no interest or duty to create a fund for the benefit of the lessor; and if the premises are sold at less than their value, the loss must fall upon the latter. (*Id.*)
8. As between the lessor and lessee, the estate of the latter is not subject to the claims of the mortgagee, or to any other encumbrance or claim upon the premises. They are charges upon the interest of the lessor only, who is bound to protect the estate of the lessee therefrom. (*Id.*)
9. The effect of the sale is to substitute the proceeds, as far as they will go, for the several interests in the premises sold, and such interests are to be satisfied out of the proceeds in their order of priority. Equity will not permit one claimant of the fund, who has covenanted to protect the title of

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another, to increase his own share of the fund, by compelling the other to contribute to the discharge of prior encumbrances. (*Id.*)

10. Where the parties claimant are before the court, and the contest is between them only, or those claiming under them, the court has power to make a final disposition of the fund in accordance with the covenants existing between them and the equities resulting therefrom. (*Id.*)

See DOWER. (4 *Lansing.*)
FORECLOSURE. (*Id.*)

SURPRISE.

See NEW TRIAL. (46 *N. Y.*)

SURROGATE.

See EXECUTORS AND ADMINISTRATORS.
(60 *Barb.*)
EXECUTORS AND ADMINISTRATORS.
(4 *Lansing.*)

SURROGATE'S COURT.

See APPEAL. (47 *N. Y.*)

SYNOD OF REFORMED CHURCH.

See RELIGIOUS CORPORATIONS. (4 *Lansing.*)

T.

TAXES AND TAXATION.

See ASSESSMENT AND TAXATION. (46 *N. Y.*)
MUNICIPAL CORPORATIONS. (60 *Barb.*)
ASSESSORS (4 *Lansing.*)

TAX ASSESSESSORS.

See ASSESSOR. (4 *Lansing.*)

TAX SALES

1. The provision of the act of 1826 (§ 43, chapter 242, Laws of 1823), requiring the comptroller to publish notices stating when the time for the redemption of lands sold for taxes would expire, is peremptory. (*Westbrook* *agt. Willey*, 47 *N. Y.*, 457.)
2. The publication of such notices for the specified time, to wit, six weeks successively, once in each week, is required to be completed six months prior to the expiration of the two years allowed for redemption, This

provision was for the protection of the land owner; and unless complied with, no title passed by the comptroller's deed. The comptroller's deed, although made conclusive evidence of the regularity of the sale, is not conclusive as to publication of such notice, after the sale. (*Id.*)

3. Mere lapse of time before bringing an action, where possession under the comptroller's deed has not been for a sufficient length of time to bar an action under the statute of limitations, is not conclusive evidence of a full compliance with the requirements of the act. (*Id.*)

TENANT.

See LANDLORD AND TENANT. (4 *Lansing.*)

TENANTS IN COMMON.

1. One tenant in common, or joint owner, cannot maintain an action for the possession of personal property against his co-tenant. (*Davis* *agt. Lotlich*, 45 *N. Y.*, 393.)
2. If the co-tenant sells, or converts the property, he may have his action for damages, or hold his title with the purchaser. He cannot compel a delivery of the possession to himself of the whole property. (*Id.*)

See PARTITION. (46 *N. Y.*)

3. Where goods are purchased by several parties under an agreement to hold in aliquot shares, with no agreement to sell jointly, but with an intent subsequently to make an arrangement for that purpose, until such arrangement is in fact made, the purchasers are not partners, but simply tenants in common, and until that time neither of them has power to bind the others by his contracts. (*Baldwin* *agt. Barrows*, 47 *N. Y.*, 199.)

4. Where one of several tenants in common, without the authority of his co-tenants, ships the property owned in common, to be sold, and when shipped obtains an advance thereon of a party cognizant of the interests of the parties, upon a representation that his co-tenants authorized the transaction; an acceptance by his co-tenants from him of a portion of the advance, induced by his representation that the advance was obtained upon his own sole credit, and that they were not liable for reclamations, is not a ratification; and their commission to restore what they received, after

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knowledge of the transaction, which knowledge is not obtained until after the shipment and sale of the property, does not make them liable upon the original contract. (*Id.*)

5. Where tenants in common of a ship employ her in a series of voyages and lettings of the vessel for hire upon joint account, the earnings and expenditures upon and in respect to different voyages going into general account, it is a particular or quasi partnership for the general employment of the vessel, and the different voyages and adventures are connected together, and parts of the trade or business carried on by the owners as partners. (*Williams* agt. *Lawrence*, 47 N. Y., 462.)

6. An assignee, therefore, of the interest of one of the joint owners in a particular voyage or adventure can take only the interest which his assignor has in the earnings of the vessel after the adjustment of the partnership accounts. (*Id.*)

See WILLS. (47 N. Y.)

7. One tenant in common in possession of the common property is only liable to pay rent, when he agrees to pay it, and such an agreement only enures to the benefit of the co-tenant with whom it is made. Nor can he set off against such rent the cost of improvements and additions not strictly repairs. (*Scott* agt. *Guernsey*, 60 Barb., 163.)

8. A tenant in common occupying without agreement to pay rent, is not liable, on partition to account for rent, even though the occupancy be by a firm of which the tenant in common is a partner. (*Id.*)

9. A tenant in common receiving rents is liable to pay interest on the sums so received, without a previous demand. (*Id.*)

10. The rent so received is a lien on the shares of the parties receiving it, in favor of the parties to whom it is due. (*Id.*)

11. If one tenant in common, to whom one or more co-tenants is or are indebted for rents, dies, his administrator is a proper party to an action for partition and an accounting. (*Id.*)

TENANTS FOR LIFE, AND IN REMAINDER.

1. One entitled in remainder, as co-tenant, during the life estate, by permission of, and agreement with, the

life tenant, erected buildings on the common property, and received rents for the same, before and after the termination of the life estate. *Held* that on partition he could not hold the buildings, or their value, and must account for the rents received after the death of the life tenant. (*Scott* agt. *Guernsey*, 60 Barb., 163.)

2. Nor will equity support such a claim, where the co-tenant has, by the rents received during the life estate, been fully reimbursed for all his expenditures and interest. (*Id.*)

3. A tenant for life, and one of the remaindermen, erected buildings on the common property, procured insurance thereon, and gave a premium note. After the death of the tenant for life, the remainderman was assessed on the note and paid the assessment. *Held* that in accounting for rents received, he was not entitled to an allowance for the premium thus paid. (*Id.*)

TENDER.

See SPECIFIC PERFORMANCE. (46 N. Y.)

TESTIMONY.

See JUSTICE OF THE PEACE. (4 Lansing.)

TITLE.

See CEMETERY ASSOCIATIONS. (46 N. Y.)

ESTOPPEL. (*Id.*)

VENDOR AND VENDEE. (*Id.*)

1. The title of a purchaser for value of stolen negotiable paper, including bonds payable to bearer, is not impaired by negligence. It will only be defeated by proof of fraud or bad faith. Notice of such facts as would put a prudent man upon his guard will not defeat his recovery therefor. (*Welch* agt. *Sage*, 47 N. Y., 143.)

2. The property in business paper received for collection by one engaged in the business of banking and collection, and forwarded by him to his correspondent in the usual course of such business, without any express agreement in reference thereto, does not become vested in the correspondent, although he may have remitted upon general account, in anticipation of collections. (*Dickerson* agt. *Wason*, 47 N. Y., 439.)

3. It is only where by express contracts, or well established course of dealing, the correspondent becomes responsible for the collection, and cannot seek re-

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imbursement of advances, in case of the non-payment of the paper, that he can retain it or the proceeds of the collection, as against the real owner. (*Id.*)

See CONSIGNOR AND COMMISSIONER. (47 *N. Y.*)

HUSBAND AND WIFE. (*Id.*)
TAX SALES. (*Id.*)

TITLE TO PERSONAL PROPERTY.

See CONTRACT. (4 *Lansing.*)
DONATIO CAUSA MORTIS. (*Id.*)

TITLE TO REAL PROPERTY.

See ADVERSE POSSESSION. (4 *Lansing*)
EVIDENCE. (*Id.*)
FORECLOSURE. (*Id.*)

THEATRICAL PERFORMANCES.

1. Songs and duets, sung by persons in costume, may be parts of a dramatic, theatrical or operatic entertainment, and must be so regarded, when connected with dialogue and sung in a public garden, for admission to which a charge is made. (*The Society for the Reformation of Juvenile Delinquents* *ag. Diers*, 60 *Barb.*, 152.)

See INJUNCTION. (60 *Barb.*,)

TOWN.

A. Under the provision of chap. 486 of the laws of 1870, a principal who has furnished jointly with a town of the county of Suffolk a substitute whose service constituted a part of the excess of years, for which moneys were received from the state, has a clear legal remedy by action against the town to recover his just proportion of such moneys. (*The People ex rel. agt. Hawkins*, 46 *N. Y.*, 9.)

TOWN BONDING:

1. The authority of the majority of the tax-payers of a town, to mortgage the whole property of its citizens, against the will of the minority, for investment in a railroad or other corporation, receives no countenance in the principles of common law, but is derived solely from legislative enactments. Every step, therefore, required by the statute, must be shown to have been taken in strict conformity therewith. (*The People ex rel. agt. Hulbert*, 46 *N. Y.*, 210.)

2. In proceedings under chap. 967, laws of 1869, it must appear, either that the tax-payers whose names appear on the petition, who did not sign personally,

were present when their names were signed, or authority in writing so to affix their names must be produced. (*Id.*)

3. As it was requisite to establish the act of the signing to give jurisdiction, it is no answer, that the objection was not taken upon the hearing before the county judge. There was no waiver upon the part of those tax payers, who did not sign and who did not appear. (*Id.*)

4. Where one signs the petition in a representative capacity, his authority to represent and thus to bind the estate of his ward or *cestui que* must be shown affirmatively by legal evidence. (*See* opinion of PORTER, J., note). (*Id.*)

5. Where the name of a corporation appears to the petition, its corporate existence, the authority of those signing to bind it in this manner, and that the corporation is *solvent*, must be proven. (*Id.*)

See CONSTITUTIONAL LAW. (46 *N. Y.*)

6. Where a county judge, in his return to a writ of *certiorari* brought to review proceedings had before him under the town bonding act of 1869 (chapter 967, Laws of 1869), did not return the evidence taken before him to prove the identity of the petitioners, and their signatures to the petitions presented to him, but simply returned that it was proven that each name subscribed to the petitions was written by or upon the request of the person so named, and whose name appeared upon the list or roll as a tax payer, without stating how many signed personally, or how many names were affixed by others.

Held, insufficient to sustain the proceedings. (*People ex rel. agt. Knowles*, 47 *N. Y.*, 415.)

7. To justify an affirmance of the proceedings, the return must show affirmatively that the county judge had jurisdiction, and the proof of a jurisdictional fact should be returned to enable the higher court to determine whether the fact was established. It should at least appear that those whose names were affixed to the petition by others were present at the time of signing, and authorized it, or that the one who affixed the signature had written authority so to do, which written authority was annexed to the petition and presented to the county judge. (*Id.*)

See COOLEY *ag. TOWN OF GUILDFORD* (mem.). (47 *N. Y.*)

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TOWING CONTRACT.

See CONTRACT. (4 Lansing.)
EVIDENCE. (Id.)

TOWN BOUNTY CERTIFICATE

See PARENT AND CHILD. (4 Lansing.)
TOWNS. (Id.)

TOWN OFFICERS.

See ASSESSORS. (4 Lansing.)

TOWN RAILROAD BONDS.

See RAILROAD MUNICIPAL BONDS. (4 Lansing.)

TOWNS.

1. Town certificates of indebtedness issued in January, 1864, for bounty to volunteers, became by the provisions of sec. 1, chap. 8, laws of 1864, debts of the town, upon which an action lies against it. (*Brown agt. Town of Canton, 4 Lansing, 409.*)

See BRIDGES. (4 Lansing.)
RAILROAD MUNICIPAL BONDS. (Id.)

TREES.

See HIGHWAYS AND STREETS. (4 Lansing.)

TRESPASS.

1. In an action of trespass for wrongfully taking and carrying away plaintiff's goods and breaking up his business, the attachments under which the goods was taken, having been set aside for irregularity, they afford no shield or protection whatever for such taking to the creditors who procured them to be issued. Such protection extends only to the officer while acting under them in the discharge of his public duty. (*Wehle agt. Butler, ante, 5.*)
2. Where all the attaching creditors actively participated in the seizure and removal of plaintiff's entire stock at one and the same time, without separating their respective proceedings, and there being no evidence from which the extent of the separate liability of any one of them could be ascertained, they must be deemed, for the purposes of the case, to have been joint tortfeasors, and as such their liability is joint and several, and enforceable accordingly at plaintiff's election. (*Id.*)
3. Where a portion of the attaching creditors only, were sued in this action, the bare fact of the existence and

simultaneous, but fruitless levy of the attachments issued by the other creditors, cannot be made available to the defendants in this action in any aspect of the case. (*Id.*)

4. All the attaching creditors having been jointly concerned in the commission of a wrong, and being jointly and severally liable therefor at plaintiff's election, they were all alike incapacitated from making a subsequent legal appropriation of plaintiff's property, either for their joint account, or for account of any one of their number, without plaintiff's assent. (*Id.*)
 5. If evidence of a subsequent legal appropriation to plaintiff's use was competent, it cannot be received on the trial in this action, not even in mitigation of damages, without being pleaded. (*See Wehle agt. Haviland, 63 How., 399.*) (*Id.*)
 6. Where an action is brought to recover treble damages for trespass on land, &c., pursuant to title 6, ch., 5, 3d part of the Revised Statutes (2 R. S., 2d ed., 261, § 1, &c.), and the plaintiff claims \$1080, but recovers only \$5, the defendant is entitled to costs. (*Id.*)
 7. This provision for costs in the Revised Statutes, in these actions, is repealed by the Code. (*Id.*)
 8. Although the Code does not, in terms, provide for costs in actions of trespass on land, yet, as it provides for costs in actions of ejectment and in actions in which title to real estate shall come in question, and is silent as to actions of trespass, it must be assumed that that class of actions was intended to be embraced by some other provision, if any is applicable to it. (*Id.*)
 9. The only other provision of § 304 which can be said to embrace this class of actions, is the subdivision of said section which gives costs to the prevailing party in actions for the recovery of money, when the plaintiff recovers \$50. And this subdivision would seem to apply to actions of trespass. (*Id.*)
 10. The provisions of chap. 459, laws of 1862, as amended by chap. 814, laws of 1867, authorizing the seizure of animals trespassing upon private premises, are constitutional. (*Cook agt. Gregg, 46 N. Y., 439.*)
- See FENCES. (60 Barb.)*
HIGHWAYS AND STREETS. (4 Lansing.)
JUDGE'S CHARGE. (Id.)
PRACTICE. (Id.)
SURFACE WATER. (Id.)

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TRIAL.

1. Where in an action of *assault and battery*, for forcibly expelling the plaintiff from defendant's premises, it is a question for the jury to determine, from the evidence whether the defendant had *actual possession* of the premises, giving him the right of such expulsion, where the evidence was uncontradicted that the defendant's son with his family occupied the premises, but under an arrangement with the defendant that the latter was to keep possession of the farm and premises and provide all the materials and necessities for living, and pay his son a stated salary per year for his services on the place. (*Comstock agt. Dodge, ante, 97.*)
2. Where the jury, under the charge of the judge, are prohibited, from passing upon the question, an exception to such charge on that point is well taken. (*Id.*)
3. Where the defendant in such action has died since the trial, and the cause of action not being one that survives, a new trial should not be ordered, for no trial of the issue can again lawfully take place. (*MASON, J. dissenting.*) (*Id.*)
4. Whenever a party obtains the postponement of the trial of a cause, on payment of costs, his adversary may insist on having the trial proceed, on omission to pay; or he may waive that right, and either compel payment by precept in the nature of a *fiery facias*, or include them in his general bill, in case he ultimately succeeds in the action. (*Gamble agt. Taylor, ante, 375.*)
5. Where the defendant put the cause over the circuit upon an order "that said cause go over the term, on payment of costs by said defendant, to the plaintiff or her attorney, of said term, and witnesses fees," and the defendant thereafter paid to plaintiff's attorney \$10 50-100 which was all the term costs, except witnesses fees, which were left for future adjustment, and on such adjustment by the court, such fees were fixed at \$50, and the plaintiff having ultimately succeeded in the action:
Held, that the plaintiff was entitled to have the balance of the costs of the circuit \$50, included in the judgment, as part of the costs in the action—ordered accordingly (*Id.*)
6. Defendant M. purchased of plaintiff an individual bank, and he, with the other defendants as his sureties, executed to plaintiff a bond of indemnity from all claims of every kind against

said bank. Prior to the transfer, certain depositors had received a promissory note to the amount of their claims against the bank, and the accounts had been balanced and closed upon the books of the bank. The note not being paid at maturity, the depositors offered to return it, and demanded payment of their respective accounts, claiming, among other things, that they had been induced to take the note by fraudulent representations of plaintiff. This state of affairs, plaintiff testified, was known to M. at the time of the transfer and giving the bond. Subsequently plaintiff was sued for the amount of the deposit balances due at the time of the receipt of the note. M., upon notice, employed counsel and defended the action; but the plaintiff in that action recovered judgment, which the plaintiff here paid:

Held, that, if M. had knowledge of these outstanding claims, plaintiff was not concluded by the bank books; that the evidence given was sufficient to require the submission of the question of knowledge to a jury; and a non-suit was, therefore, error. (*Hart agt. Messenger, 46 N. Y., 253.*)

7. That the rejection of testimony offered by plaintiff, tending to show M. had such knowledge, was error. (*Id.*)
8. A court or referee is presumed to have knowledge of the contents of the pleadings in a cause, and it is not necessary for a party to read them in evidence, in order to avail himself of admissions therein. (*White agt. Smith, 46 N. Y., 418.*)
9. After a trial was commenced before a referee, a portion of the evidence taken, an adjournment was granted upon plaintiff's motion, in order to enable him to apply to the court for leave to serve a reply to defendant's counter-claim: permission was obtained and reply served. Upon the adjourned day the plaintiff insisted that the trial should be commenced *de novo* this the referee refused to do:

Held, no error. (*Id.*)

10. One of the plaintiff's witnesses was permitted to state, under objection, a conversation between plaintiff and one W., the book-keeper of defendant, and acting as his agent in the shipment of freight; no material evidence was given. Subsequently the same witness testified, without objection to a conversation with W., a portion of which was competent as a part of the *res gestae*, and a portion incompetent.—*Held*, that as conversation with W.,

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pertaining to business transacted by him at the time, were competent, and as error is never to be presumed, but must be made plainly to appear, it is to be assumed the court in overruling objection to first question only intended to hold, that conversation with W. relating to business then being transacted were competent, and that the objection then taken could not be made applicable to the subsequent incompetent evidence. If the ruling of the court was intended to apply to all conversations, the objection, to avail defendant, should have been more specific, so that the intent would be made plainly to appear. (*Stargess* agt. *Bisell*, 46 N. Y., 462.)

11. If there are any reasons for the exclusion of evidence competent in itself growing out of the proceedings upon the trial, or the prior examination and statements of the witness, they must be pointed out and the attention of the court called to them; a general objection is insufficient. It is within the discretion of the judge at the trial, to allow a witness to be recalled and to explain, qualify, or contradict his former statements, and his decision cannot be reviewed. (*Williams* agt. *Sargeant*, 46 N. Y., 481.)

12. A dispute having arisen between plaintiff, defendant, and others, in regard to the location of the boundary lines of a lot of land owned by defendant, an agreement in writing to compromise and settle the same was entered into by all the parties, one provision of which was that M. should go upon the land and designate the line between plaintiff and defendant, as the same existed when M.'s father occupied the lot. Defendant offered proof of revocation upon his part of M.'s authority to locate the line, and also proof of actual location of the line, both of which were rejected.—*Held*, that the agreement was a valid and binding one, and fixed as the true line between the parties, the one that existed and was recognized when M.'s father occupied the premises, and left only the question to be determined as to the location of that line. But that M. was simply empowered to act as arbitrator upon this question, and as such his power was revocable. That the question should have been submitted to the jury to determine the location of the line, and that the rejection of the testimony, both as to revocation and location, was error. (*Wood* agt. *Lafayette*, 46 N. Y., 484.)

- 3 In an action for work, and labor and materials furnished in manufacturing

certain articles for defendant, the defence was that the articles were not to be paid for, until defendant should collect and receive pay from those to whom he should sell them, and that, in consequence of the unskillful manner of their construction, the articles were defective, and the defendant's vendees refused to pay therefor. *Held*, it was not competent for defendant, upon the trial, to show that his vendees claimed damages. (*Seltenreich* agt. *Hiemens*, 46 N. Y., 677.)

14. The judge charged the jury, that, if they found the agreement was, that defendant might sell on a reasonable term of credit, and he had so sold and that term had expired, then plaintiff could recover, though defendants had not been paid by his vendees: to which defendants excepted.—*Held*, exception not well taken. (*Id.*)

See EVIDENCE. (46 N. Y.)

15. Defendant's answer alleged that she had "no information sufficient to form a belief" as to the truth of the allegations of the complaint. Upon trial before a referee, leave was granted to amend by inserting the words "knowledge or" before "information," so as to bring the answer within section 149 of the Code.

Held, that the amendment was within the power and discretion of the referee. (*Bennett* agt. *Lake*, 47 N. Y., 93.)

16. The judge upon trial charged, that if the jury should find the facts precisely as defendants' witnesses testified, still they were liable, and, thereupon, directed the jury to find a verdict for the plaintiffs. To which defendants' counsel excepted.

Held, that it was not necessary to request the court to submit any question of fact, in order to enable defendants to raise the question upon appeal as to the correctness of the charges and direction. (*Low* agt. *Hall*, 47 N. Y., 104.)

17. Where several distinct grounds of liability, on the part of the defendant, are submitted to the consideration of a jury, if either was improperly submitted, and the verdict is a general one, the judgment will be reversed, unless it appear that some one of the others was so clearly established by uncontroverted evidence as to have rendered it the duty of the court to direct a verdict for plaintiff. (*Baldwin* agt. *Burrows*, 47 N. Y., 199.)

18. To maintain an action for unrec-

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ment from service, it must appear that the child, apprentice, or servant, was at the time in the actual service of the parent or master, and that the moving cause of the desertion was the inducement held out by the defendant. (*Caughy* agt. *Smith*, 47 N. Y., 244.)

29. In an action for unlawfully harboring and concealing plaintiff's minor son, and inducing him to enlist in the service of the United States, as a substitute for defendant.

Held, that the taking out of letters of administration by plaintiff, after the death of the minor son, upon his estate, and as administrator, demanding and receiving of defendant the bounty money paid to the son upon his enlistment, and of the government his arrears of pay, were not a ratification of the contract of enlistment. They were not amounts received by the father as an equivalent for the loss of the son's service, to which he was entitled, but were debts due to the estate of the son, to which plaintiff was entitled by the operation of statute laws. (*Id.*)

30. That it was necessary to aver and prove knowledge, on the part of defendant that the minor owed service to plaintiff, and wrongfully deserted that service; that knowledge of the minority, and that the father was living, was sufficient to charge defendant with the legal inference therefrom, that the father was entitled to the custody, labor and services of the minor; but if there was an honest belief, on the part of the defendant, that the youth had left the father's service with the father's consent, he was not liable. Also, that for the purpose of showing this, it was competent for defendant to prove the declarations of the minor, when he engaged with him, that his father was willing he should go into the military service of the government. (*Id.*)

31. That a refusal of the court to charge, that to support the action the plaintiff must satisfy the jury that the defendant, when he put the son into the service, was doing so against the plaintiff's consent, was not error. (*Id.*)

32. *Somble* of a request to charge that, to render defendant liable, he must have known that the son was under the age of eighteen years at the time of the enlistment. (*Id.*)

33. That it was error for the court to charge that, if the plaintiff's son was

under the age of eighteen at the time of the enlistment, the defendant was liable whether he knew it or not. (*Id.*)

24. Rules of evidence prescribed by congress are not binding on state courts. (*Caldwell* agt. *N. J. Steamboat Co.*, 47 N. Y., 282.)

25. The general rule that a party is entitled to examine his own witnesses upon material facts, and should not be precluded by answers made upon the examination by his adversary, is a matter of discretion, and a refusal to permit such examination, after the witness had fully testified upon the subject of the proposed examination, is not ground of reversal, unless it can be shown the party has been injured or prejudiced. (*Id.*)

26. After the testimony in a case has closed, it is discretionary with the court whether to open the case or not, to receive additional evidence, and the decision is not reviewable here. (*Id.*)

27. After a jury had retired, upon returning into court for further instructions, the judge remarked, in substance, that he thought there was not much difficulty in arriving at a conclusion, and that if they did not agree, he would feel it his duty to keep them together until Monday (it being then Thursday):

Held, that the first portion of the remark was not error, as the court neither expressed nor gave an intimation of his opinion; the last portion was a matter of discretion, and not reviewable upon a bill of exceptions. For an abuse of this discretion, relief is to be obtained by motion to set aside the verdict. (*Id.*)

28. Where an action in the nature of a creditor's bill is brought against a husband and wife by a judgment creditor of the former, to reach real estate claimed to have been fraudulently conveyed to the latter, and where after issue is joined the wife dies, the plaintiff failing to show fraud, cannot have judgment for the interest of the husband in the land acquired upon the death of the wife. (*Curtis* agt. *Fox*, 47 N. Y., 299.)

29. As such interest did not vest until after the putting in of the answer, defendant's silence was not a waiver of the objection; that, so far as this interest was concerned, plaintiff's remedy was by execution. (*Id.*)

30. Where, upon a trial before a referee,

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the plaintiff at the close of his evidence is nonsuited and duly excepts, a question of law is raised upon which it is competent for the general term to reverse the judgment if the decision was erroneous. It is a decision that, as a matter of law, there is no evidence to sustain the complaint; and if the evidence, although insufficient to constrain the referee to find for the plaintiff, is such as would have required the submission of the question to a jury, and would have been sufficient to sustain a finding for plaintiff, it is error. (*Scotfield agt. Hernandez*, 47 N. Y., 313.)

31. The rule that every reasonable doubt upon any question of law or fact bearing upon the guilt or innocence of the prisoner in a criminal trial should be solved in his favor, does not apply to a question as to the jurisdiction of the court. Doubts as to jurisdiction may be solved in favor of the tribunal exercising it, unless by so doing some established rule of law will be palpably violated. (*G. H. Smith agt. People*, 47 N. Y., 330.)

32. Where upon the trial of an action, there are disputed questions of fact, a direction by the court to the jury to find for the defendant is, in effect, a decision that plaintiff is not entitled to recover upon any finding warranted by the testimony, and an exception to such direction is sufficient to present the question of law upon appeal. Plaintiff is not required to request the court to submit the questions of fact to the jury. (*Stone agt. Flower*, 47 N. Y., 566.)

33. A special verdict differs from the findings of a court or referee in this, that the jury cannot be presumed to have found more than is specified in their verdict, and a general verdict directed by the court upon the strength of the findings does not add to their force or effect. (*People agt. W. Turnpike and B Co.*, 47 N. Y., 586.)

See APPEAL. (47 N. Y.)
ASSESSMENT AND TAXATION. (*Id.*)
DEPOSITION. (*Id.*)
FALSE PRETENCES. (*Id.*)
FRAUD. (*Id.*)
INSURANCE, LIFE. (*Id.*)
MUNICIPAL CORPORATIONS. (*Id.*)
PRACTICE. (*Id.*)
PRACTICE. (4 *Lansing*.)

TRUSTEES OF VILLAGES.

See HIGHWAYS AND STREETS. (4 *Lansing*.)

TRUSTS AND TRUSTEES.

See MORTGAGE. (46 N. Y.)
WILLS. (*Id.*)

1. The provisions of the statute in reference to fraudulent conveyances and contracts in reference to lands (title 1, chapter 7, part 2, of the R. S.) do not preclude a party from establishing an implied or resulting trust recognized by the common law. The transaction, out of which a trust of this character arises, may be proved by parol; but the trust itself must rest upon the acts or situation of the parties as proved, and not merely upon their declarations. (*Boole agt. Bryant*, 47 N. Y., 544.)

2. Where one pays the consideration for real estate and a conveyance is taken in the name of another, although by section 51 of the statute of uses and trusts (1 R. S., 728), no trusts results in favor of the person paying the money, and the title is vested in the alienee named in the conveyance, yet it is competent for the alienee to regard the equitable rights of such person, and to secure them either by a lawful declaration of trust or by a conveyance. (*Id.*)

3. Where, therefore, in such case the one paying the consideration requests a third person to take the title and hold it for his benefit, and the alienee executes a conveyance to such third person, intending it as an execution and admission of the trust, but the conveyance is, without the knowledge or consent of the *cestui que trust*, an absolute one, the case is brought within the exceptions of section 53 of said statute, and a trust results in his favor. (*Gilbert agt. Gilbert*, 1 *Keyes*, 159, questioned.) (*Id.*)

4. The rule is not changed by the fact that the person paying the consideration was a married woman, and the payment was made prior to the acts of 1848 and 1849 in relation to married women. It was competent for the husband, except as against creditors, to recognize the equities of the wife, and to secure it upon property. (*Id.*)

See INSURANCE, LIFE. (47 N. Y.)
WILLS. (*Id.*)

5. Where a *cestui que trust* resided in this state, and the original trustee although he died in Connecticut, resided in this state when he was appointed, had the trust fund here, at the time, and partly executed the trust here; and the *cestui que trust* was an infant and needed the fund for his support;

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it was held that, under these circumstances, the power of the court to appoint a new trustee within its own territorial jurisdiction could not be doubted. (*Curtis* agt. *Smith*, 60 Barb., 9.)

6. Held, also, that the Supreme Court was not divested of jurisdiction by the removal of the former trustee from the state, although he took the fund with him; the *cestui que trust* continuing to reside here. (*Id.*)

7. The statute devolving a trust upon the court, on the death of a surviving trustee, and authorizing the appointment of a new trustee, (1 R.S., 730, § 68,) applies to a trust of personal as well as real estate. (*Id.*)

8. Where one of two trustees disclaimed acting as trustee, by an answer in chancery, in Missouri; Held that his subsequent death, without ever assuming the trust or claiming a right to act, made valid that disclaimer, and vested all the estate in the surviving trustee, and the *cestui que trust* were bound by the decree in that suit. (*Clemens* agt. *Olmens*, 60 Barb., 366.)

See AGREEMENT. (60 Barb.,)
WILL. (*Id.*)

9. A trust of personal estate, for the use and benefit of the grantor or donor, is valid, and vests the legal title in the trustee, unless the purposes of the trust are unlawful. (*Foster* agt. *Oce*, 4 Lansing.)

10. A conveyance of all his real and personal estate, on account of the grantor's age and infirmities, and in consideration of one dollar, with a proviso that the grantee shall sell and convey the lands at retail, and that the avails shall be paid over to the grantor during his life, and afterward applied to pay debts and expenses of the trust, and the residue distributed as directed in a subsequent instrument to be executed by the grantor; or in default of such instrument to the grantor's heirs, though void as an express trust, confers, it seems, a valid power in trust, and is irrevocable, although the subsequent instrument provided for is not executed. (*Fellows* agt. *Heermans*, 4 Lansing, 230.)

See ADVERSE POSSESSION. (4 Lansing.)
FORECLOSURE. (*Id.*)
MANUFACTURING CORPORATION. (*Id.*)
MORTGAGE OF REAL ESTATE. (*Id.*)

U.

USE AND OCCUPATION.

1. To enable a party to maintain an action for use and occupation, under the provision of the Revised Statutes authorizing such an action to be brought under any agreement, whether by deed or parol, the conventional relation of landlord and tenant must exist. (*Thompson* agt. *Bower*, 60 Barb., 463.)

2. Where one occupies under an agreement to purchase, he is not a tenant, but a vendee, and the relation that of vendor and vendee, and in no conventional sense that of landlord and tenant. (*Id.*)

3. Distinction between the action for *mesne* profits and the action for use and occupation. (*Id.*)

See LANDLORD AND TENANT. (4 Lansing.)
LEASE. (*Id.*)

USES AND TRUSTS.

See LIEN. (46 N. Y.)

UNITED STATES COURTS.

See FEDERAL COURTS. (4 Lansing.)

UNITED STATES DEPOSIT FUND.

See LOAN COMMISSIONERS. (4 Lansing.)

UNITED STATES LOAN COMMISSIONERS.

See LOAN COMMISSIONERS. (4 Lansing.)

USE.

See EASEMENT. (4 Lansing.)
ESTOPPEL. (*Id.*)

USURY.

1. Where an advance is made in one place, upon a check drawn upon a bank in another, no question of usury can arise out of the transaction, as there is no loan or forbearance of money for any time whatever. (*Crocker* agt. *Colewell*, 46 N. Y., 212.)

2. To establish usury, some consideration in addition to lawful interest must proceed from the borrower. It is not enough that the lender is moved by consideration of collateral benefits to himself, which may result indirectly

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from the transaction, provided they are not a burden imposed upon the borrower, and to which he submits as the means of obtaining the loan, and which are intended as a compensation to the lender beyond the legal rate of interest. (*Clarke* agt. *Sheehan*, 47 N. Y., 188.)

3. Where parties are desirous of entering into a contract for their mutual advantage, the mere fact that a part of the arrangement is a loan by one to the other at the legal rate of interest, to enable him to perform his part, does not present a case of usury, although the loan would not have been made except as part of the contract, and even though the contract would not have been made without the loan. If provision is made for full compensation to the borrower for all he may do under the collateral contract, there is no usury. (*Id.*)

4. Where, in action upon a promissory note, the single question to be tried is, whether there was a corrupt and an usurious agreement made upon a loan of money which was the consideration of the note, the intent of the parties is a question of fact; and that question having been found by the jury against the defendants, upon conflicting evidence, their finding is conclusive; unless some error was committed on the trial, by the judge, in his rulings; or charge to the jury. (*Horton* agt. *Moot*, 60 Barb., 27.)

5. Whether the transaction was a contrivance on the part of the plaintiff, by which he obtained more than seven per cent for the loan or forbearance of money; whether it was a fraud upon the statute, or an evasion of the statute, to cover usury; whether the plaintiff bought the note of the bank at which it was payable; or whether the bank acted as the agent of the plaintiff, in committing the fraud—are not questions of law, independent of the facts upon which the propositions are based. And if the jury find, correctly, against the defendants upon them, the court cannot reverse their findings. (*Id.*)

6. Where the usurious character of a mortgage has been determined in, and appears by, the record of a former suit, there is no necessity for a bill *quia timet*, to entertain which is discretionary with a court of equity. (*Bissell* agt. *Kellogg*, 60 Barb., 617.)

7. This principle is applied to obligations void for usury, notwithstanding the imperative provisions of the act of 1837. (*Id.*)

8. The usury act, of 1837, was not designed to require a court of equity to entertain a suit which, according to its settled practice, it would not have entertained before that act, but only to relieve a borrower, under a usurious contract, from the obligation to repay the money actually borrowed, in cases where a resort to a court of equity was necessary either for discovery or relief. (*Id.*)

9. The former rule of courts of equity, requiring a complainant who sought relief in that court against a usurious contract, obligation or security, to repay the money actually loaned, with interest, as a condition of granting the relief, was abrogated by the statute of 1837 only in behalf of the borrower. The rule is not abrogated as to the grantee of the borrower. When such grantee, as such, commences a suit for relief, the rule requiring him to do equity, as a condition of relief, still applies. (*Id.*)

See MORTGAGE. (60 Barb.,)

10. No rule of law makes it unlawful, or usurious, to loan a borrower money to pay the usurious debt of such borrower to another. (*Wilson* agt. *Harvey*, 4 Lansing, 507.)

11. The plaintiffs' testator loaned his individual funds to the defendants' testator, on bond and mortgage, with knowledge that the money was borrowed to pay the borrower's notes due to a bank, of which the lender was president and financial officer, but without any agreement in that respect, and it was used for that purpose. In an action to enforce the bond and mortgage:

Held, that the defendant could not defend on the ground of usurious consideration taken by the bank on negotiating the notes. (*Id.*)

V.

VACANCY.

See CONSTITUTION. (47 N. Y.)

VARIANCE.

1. Where a summons and complaint were issued against the city of Lockport to recover a liquidated specified sum, for services as police constable, an allegation in the complaint that the defendant neglected and failed to keep the means in the hands of its treasurer to pay said account, and that there was no funds in his hands out of which he

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could properly pay said order, did not make the cause of action in the complaint a tort for negligence. (*Prudden* agt. *City of Lockport*, ante, 286.)

2. Consequently, there was no variance between the summons and complaint; both were for a money demand on contract. (*Id.*)
3. In an action of slander, the plaintiff, as a witness on his own behalf, stated, on cross-examination, that he had had litigation with the defendant. He was then asked how many suits he had had with him, and for what causes of action?

Held, that the court below properly excluded so much of the inquiry as related to the causes of action. It was in no way material or pertinent to the issue. Its materiality consisted solely in its bearing upon the credit due to the plaintiff as a witness, and was therefore collateral in its nature. The end of such an inquiry would result in an unlimited examination of the previous litigation, and in attempts to indicate the different positions occupied by the parties engaged in it. (*Boynston* agt. *Boynston*, ante, 380.)

4. To the question, whether the plaintiff had not previously sued the defendant for slander and recovered only \$10:

Held, that this was included in that portion of the previous question which the court rejected as improper. That the remarks on that exception were equally applicable to the exception taken to the exclusion of this inquiry. (*Id.*)

5. Where on the trial there is a variance between the evidence and the complaint which the court is authorized to disregard, it will be disregarded unless the defendant proves that he has been misled to his prejudice. (*Id.*)

VENDOR AND VENDEE.

1. One having possession of personal property as a bailee for hire, with an executory and conditional agreement for its purchase, which conditions have not been performed, can give no title thereto to a purchaser, although the latter acts in good faith and parts with value, without notice of the want of title of his vendor. (*Austin* agt. *Dye*, 46 *N. Y.*, 500.)
2. Where upon the sale and delivery of goods the vendor receives from the purchaser the note or bill of a third person, the presumption is that the note or bill was accepted in payment, and satisfaction, and the onus is upon

the vendor to show that it was not thus received. (*Gibson* agt. *Tobey*, 46 *N. Y.*, 637.)

3. Where a contract is made for the sale and delivery of specified articles of personal property, under such circumstances that the title does not vest in the vendee, if the property is destroyed by an accident, without the fault of the vendor, so that delivery becomes impossible, the latter is not liable to the vendee in damages for the non-delivery. (*Dexter* agt. *Norton*, 47 *N. Y.*, 62.)
4. No act of the vendor alone, in performance of a contract of sale, void by the statute of frauds, can give validity to such a contract. Where no part of the price is paid by the vendee, there must not only be a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee, to pass the title or make the vendee liable for the price; and such acceptance must be voluntary and unconditional. Some act or conduct on the part of the vendee, manifesting an intention to accept the goods, as a performance of the contract, and to appropriate them, is required to supply the place of a written contract. (*Caulkins* agt. *Hellman*, 47 *N. Y.*, 449.)
5. Evidence of a *bona fide* attempt upon the part of the vendee, immediately upon receipt and examination of the goods, to communicate to the vendor a message declining to accept, is proper, as part of the *res gesta*, and material as qualifying the act of receiving and retaining the goods, and rebutting the presumption of acceptance arising therefrom, although such message was never received by the vendor. (*Id.*)

BILLS, NOTES, CHECKS. (47 *N. Y.*)
 CHATTEL MORTGAGE. (*Id.*)
 EJECTMENT. (*Id.*)
 INSURANCE, LIFE. (*Id.*)
 LIMITATION OF ACTIONS. (*Id.*)
 TRIAL. (*Id.*)
 AUSTIN agt. STRONG (mem). (*Id.*)

VENDOR AND VENDEE OF CHATTELS.

See CONTRACT. (4 *Lansing*.)
 EVIDENCE. (*Id.*)
 PRACTICE. (*Id.*)
 SALE OF CHATTELS. (*Id.*)

VENDOR AND VENDEE OF REAL ESTATE.

See PARTIES TO ACTION. (4 *Lansing*.)

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VENDOR AND PURCHASER.

1. In an action by a purchaser, against the vendor to recover damages for fraudulent representations of the latter, upon a sale and purchase of land, the evidence showed that during the negotiations the plaintiff informed the defendant that he would not purchase lands held under a tax title; and that the defendant represented that he "had good title, and the best kind of title" to the lands in question; that they had been selected as choice lands, many years before, by one who had great opportunities of locating choice lands and that such person had conveyed some of the lands so selected by him, to his brother, and the latter had conveyed them to the defendant. The falsity of the representations was clearly proved, and the judge charged the jury that there was no dispute that the lands were held by the defendant under tax titles; and that if the defendant made the representations proved, knowing that the title was a tax title, it would be fraud. *Held* that the charge was correct; and that a verdict having been rendered for the plaintiff, in accordance with it, and upon the weight of evidence, a new trial was improperly granted. (*Updike* agt. *Abel*, 60 *Barb.*, 15.)
2. Words used by a vendor, during a negotiation for the sale of land, respecting the title, and susceptible of sustaining a separate allegation of fraud, in the complaint, but not inserted therein, may be used as evidence to sustain the allegations that are contained in the complaint, if employed during the same conversation with the latter allegations, and incapable of separation from them. (*Id.*)
3. An agreement by parol having been made between the plaintiff and the defendants, for the sale of a dwelling house by the latter to the former, and the possession thereof, the plaintiff paid the purchase money. A writing was subsequently executed by the defendants, and delivered, but it did not contain all the agreement. And upon the plaintiff objecting to it, and returning it, on the ground that it did not provide for giving him possession, the defendants virtually admitted the fact, by not denying it, and agreeing to make it all right. *Held* that the defendants having received the plaintiff's money upon an agreement to give him possession, equity and common justice demanded that they should make him good by returning the money, or giving possession accord-

ing to agreement. (*Hoag* agt. *Owen*, 60 *Barb.*, 34.)

4. It is only innocent purchasers who purchase property converted into a different species that can be protected; and not even an innocent purchaser is so protected, who takes the title from a trespasser or wrong-doer; because the trespasser had none to give. (*Id.*)
5. The owner of the original material may still retake it in its improved state, or he may recover its improved value. (*Id.*)

See AGREEMENT. (60 *Barb.*)
USE AND OCCUPATION. (*Id.*)
WARRANTY. (*Id.*)

VERDICT.

See EVIDENCE. (4 *Lansing*.)
EJECTMENT. (*Id.*)

VESSELS.

See FEDERAL COURTS. (4 *Lansing*)

VILLAGES.

See HIGHWAYS AND STREETS. (4 *Lansing*.)

VILLAGE ORDINANCES.

1. An action cannot be sustained by the trustees of a village against an individual upon a resolution, though called an ordinance, passed by them, imposing a penalty on the defendant of \$25, for a failure to remove an awning over the sidewalk in front of his store, where within the meaning of the village charter, ordinances must be general and not special only, imposing a penalty on a single individual. (*Trustees of Canajoharie* agt. *Bush*, ante, 155.)

VOLUNTEERS.

See PARENT AND CHILD. (4 *Lansing*.)
TOWNS. (*Id.*)

W.

WAGES.

See PARENT AND CHILD. (4 *Lansing*.)

WAIVER.

1. A lease contained a covenant upon the part of the tenant, not to sublet without the written consent of the landlord, under penalty of forfeiture,

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etc. The tenant sublet with the knowledge of the landlord, who subsequently received the rent.—*Held*, that this was a waiver of the forfeiture, and the right of the landlord founded upon the subletting, or the occupancy thereunder, was gone. (*Ireland* agt. *Nichols*, 46 N. Y., 413.)

2. A contract valid in its inception becoming void by virtue of its provisions, may be revived by the act of the parties thereto. A condition of forfeiture in a policy of insurance may be waived, and the policy revived after the happening of the event, which works the forfeiture, by any act from which the consent of the underwriters may be inferred. (*Shearman* agt. *N. Fire Ins. Co.*, 46 N. Y., 526.)

See APPEAL. (46 N. Y.)
SPECIFIC PERFORMANCE. (*Id.*)
STOCK BROKER. (*Id.*)
VENDOR AND VENDEE. (*Id.*)
RELIGIOUS CORPORATIONS. (4 *Lansing.*)

WAR.

See CONTRACT. (4 *Lansing.*)

WARRANTY.

1. If a thing be ordered of the manufacturer, for a special purpose, and it be supplied and sold for that purpose; there is an implied warranty that it is fit for that purpose. (*Park* agt. *The Morris Axe and Tool Company*, 60 Barb., 140.)

See INSURANCE, (FIRE.) (60 Barb.,)
DEFENSES. (4 *Lansing.*)
SALE OF CHATTELS. (*Id.*)

WASTE.

See PRACTION. (4 *Lansing.*)

WATER COURSES.

1. No riparian proprietor has a right to use the water of a stream to the prejudice of other proprietors above or below, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He may use the water while it flows over his land as an incident thereto, but he cannot unreasonably detain it, or give it another direction, but must return it to its ordinary channel when it leaves his estate. (*Clinton* agt. *Myers*, 46 N. Y., 511.)
2. A party has a right to erect a dam across a stream upon his land, and such machinery as the stream in its ordinary stages is adequate to propel, and if in season of drought, it becomes inadequate

for that purpose, he may detain the waters for such a reasonable time, as may be necessary to raise the requisite head to enable him to use it advantageously and profitably upon such machinery. He has no right to erect machinery, requiring for its propulsion more water than the stream furnishes at its ordinary stages, and operate such machinery by accumulating the water and discharging it upon those below in unusual quantities to their prejudice. Nor has he a right to create a reservoir, and retain and store the water therein for future use in a dry season. (*Id.*)

3. Plaintiff erected a dam across a stream flowing through his land, and used it to detain the water in the pond during the autumn and spring, when his factory adequately supplied with water from another source; when that failed the deficiency was made up from the reservoir thus created. Defendant, the owner of land upon the stream below, opened the gates and let off the accumulated waters, claimed the right so to do.—*Held*, that an injunction could not be sustained; that it was no argument therefor that the detention of the water was no injury to defendant, or that he insisted upon his legal rights to the water from bad motives, or purposes of annoyance. (*Id.*)

4. Where the parties maintaining and using a dam upon a stream below plaintiff's dam, had for more than twenty years used flush boards upon their dam, more or less, at different seasons of the year, which were so far removed when they materially interfered with plaintiff's mill by flowing back water upon his wheel, and when complaint was made, as to satisfy the demand, but were not entirely removed, one board being almost, if not quite universally left on after complaint, without further objection.—*Held*, that the proprietors of the lower dam had a prescriptive right to place and use flush boards thereon to a height, that would not materially obstruct the action of plaintiff's mill wheels. The right to be measured and limited only by its non-injury to the use of plaintiff's mill. (*Hall* agt. *Augsbury*, 46 N. Y., 622.)

See HIGHWAYS. (60 Barb.,)
SURFACE WATER. (4 *Lansing.*)

WAYS.

See PRIVATE WAY. (4 *Lansing.*)

WILL.

1. It has long been the settled law of

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this state, that the execution of a will may be proved on a trial at law, by one witness, if he is able to prove its perfect execution. (*Cornwall agt. Woolley, ante, 475.*)

2. Where one of two subscribing witnesses to the execution of a will resides out of the state, and due proof of its execution is made by the other witness, a devise made in the will to the non-resident witness is not void under the statute. (*Id.*)

3. W. B., a resident of the State of Connecticut, died seized of real estate situate in that state and in New York, and leaving a last will and testament, which after providing for certain legacies, etc., gave all the residue of his estate, real and personal, to his executors, and the survivor of them, as joint tenants upon certain specified trusts. By another clause, he authorized said trustees to sell the real estate in Connecticut, and to invest the proceeds in real estate, loans, bonds and stocks located in the New England states or in the state of New York.—*Held*,

1st. The will gave the trustees no power to sell the real estate, of which the testator died seized, situate in New York.

2d. The power of sale, if any was conferred, is discretionary, and until exercised by an actual sale did not effect a constructive or equitable conversion of the realty into personalty.

3rd. The real estate situate in New York, both that of which the testator died seized and that purchased by the trustees, must be regarded as realty; and the validity of the testamentary disposition thereof, and the rights of those claiming it by descent, must be determined by the laws of this State. (*White agt. Howard, 46 N. Y., 144.*)

4. A devise to an unincorporated charitable association is void, and is not made valid by the incorporation of such association after the death of the testator. (*Id.*)

5. So, also, a subsequent amendment of its charter, imparts no vitality to a devise to a corporation, not authorized to take at the time of such death. (*Id.*)

6. A devise to a corporation organized under the laws of another state, is void, unless it is authorized so to take by a statute of this state, although by its charter it has that authority. (*Id.*)

The trusts in the will of W. B., so far as material, were, in substance, to apply the rents, issues and profits of the trust fund to and for the use and

benefit of F. H. B., daughter and only child of testator; and in case she died without issue, to pay certain legacies, and to divide the residue equally between six societies and corporations, four of which were incapable of taking by devise. F. H. B. survived the testator, and died without issue.—*Held*, that a contingent remainder, in four-sixths of the real estate, was undisposed of by the will, which upon the death of the testator, passed to the heirs; that F. H. B., as sole heir, became seized of this remainder, and upon her death it went to her heirs. (*Id.*)

8. In an action brought to obtain judicial construction of a will, it was adjudged that the title to a greater portion of the real estate of which the testatrix died seized vested in her heirs upon her death, subject to the execution of a power of sale by the executors, and said executors were directed to sell and convey said real estate in pursuance of a contract made by them. This was accordingly done, and the proceeds paid over to the county treasurer. Subsequently one of the heirs, an infant over eighteen years of age, died, leaving a will whereby she devised and bequeathed all of her property to her husband, who petitioned to have the share of his wife in the fund paid over to him.

Held, that the proceeds of the sale were to be regarded as personal property, and that the portion of the infant heir could be disposed of by and passed under her will. (*Horton agt. McCoy, 47 N. Y.*)

9. Where real estate owned by tenants in common, of whom an infant is one, is sold under and in pursuance of a judgment in a partition suit, instituted by others of the tenants in common, the portion of the proceeds belonging to the infant remains impressed with the character of real estate, and, as such, does not pass under the infant's will. (*Id.*)

10. Whether a trust created by a will, as to realty situated in another state, is valid or not, can only be determined by the courts of that state. (*Knox agt. Jones, 47 N. Y., 389.*)

11. Although real and personal property are given by the same clause of a will and upon the same trust, they are severable, and the validity of one does not depend upon that of the other. And where the testator was domiciled in this state at the time of his decease, the validity of the bequests of personal

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property depends upon the laws of this state. (*Id.*)

12. Where personal property is bequeathed to an executor in trust, to receive and pay over the income to the *certain* trust, the latter acquires an equity under the will, but no legal estate in the property itself. Such a trust is not within the class of passive trusts condemned by the statute. The executor and trustee is not the absolute owner, but holds upon special trust, and if the trustee may, in any event, suspend the ownership for a longer period than during the continuance of two lives in being at the time of the death of the testator, the disposition is void. A void trust, which is separable from other valid trusts, and is not an essential part of the general scheme, may be cut off, but where the trust is an entirety it cannot be sustained in part and avoided in part. (*Id.*)

13. J., by his last will, bequeathed his personality to his executor, in trust, to pay the income to W. B. J., during his life; upon his death, the income to be divided equally and paid to C. and G. during their lives; and upon the death of both, the whole estate to pass to the child or children of G.; if G. die without issue, then to the trustees of Columbia College.

Held, that by the terms of the will there was no vested estate in remainder until the death of the three *certain* trust, and that the bequest was therefore void. (*Id.*)

14. A devise of lands, with power of absolute disposal for the use of the devisee, without anything to qualify the words, is a gift in fee simple. (*Terry* agt. *Wiggins*, 47 N. Y., 512.)

15. The word "estate," used in a devise, refers to the testator's title, and indicates an intent to give all the estate or interest in the property which the testator can dispose of by will, unless by express terms or by necessary implication it appears that it was used as descriptive of or referring to the *corpus* of the property, but it may be controlled by other portions of the will. (*Id.*)

16. Where, therefore, after a devise in fee, the will contained a devise of other "real estate" to the same devisee for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, in part or the whole, if she should require it or deem it ex-

pedient, and upon her death a devise over to a religious society:

Held, that, by the late devise, the devisee took a life estate only, with a conditional power of disposal annexed, which did not operate to enlarge the estate to a fee, and only authorized a disposition by the devisee, by a conveyance which should take effect during her lifetime, not by will; also, that the limitation over was not repugnant to the devise, and was valid. (*Id.*)

17. Where objects of a trust, in a will executed in Missouri, as to charity, as to accumulation, as to the limitation for more than two lives, &c., were clearly void, under our laws, and could not be enforced here; and these provisions were so connected with the whole trust, and dependant upon their connection with the residue, that no part of the trust could be carried out without working injustice, and giving to a portion of the testator's family a larger share of the estate than was intended, if the whole trust could have been sustained. *Held* that the testator's objects would be much better accomplished by declaring the whole will void than by sustaining only small portions of the instrument. (*Olemons* agt. *Olemons*, 60 Barb., 366.)

18. The question as to the degree of mental capacity requisite to enable a testator to make a valid will, has of late received so much discussion, and particularly in the court of appeals in the cases of *DeLafield* agt. *Parish*, (25 N. Y. 9;) *Van Guxaling* agt. *Van Kuren*, (35 *Id.*, 70;) *Tyler* agt. *Gardiner*, (*Id.*, 559,) and other cases, that it only remains for the courts to apply the law to particular cases as they arise. (*Kinne* agt. *Johnson*, 60 Barb., 69.)

19. The rule as laid down in *DeLafield* agt. *Parish*, and concurred in and asserted in other cases—viz., that a testator must have a sufficient mind to comprehend the nature and effect of the act he is performing; the relation he holds to the various objects of his bounty; and to be capable of making a rational selection among them—is now the established rule, as to the measure of mental capacity requisite. (*Id.*)

20. The objection, to a will, that the testator, at the time of making it, was under undue influence and restraint, always implies that he had sufficient mental capacity to make a valid will, but that the will in question was not

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his own free and voluntary act, but was in fact a will imposed upon him by others, (*Kinne* agt. *Johnson*, 60 Barb., 69.)

21. When a large portion of the property of a decedent is given, by his will, to one standing in a fiduciary relation to the testator, the circumstance is suspicious, if it does not furnish a ground for the presumption that undue influence was exerted or fraud practiced upon the testator in procuring the execution of the will. (*Id.*)

22. The influence arising from gratitude, affection or esteem, is not *undue*. To make it undue influence, it must be such as practically to destroy free agency. (*Id.*)

See *Scott* agt. *Guernsey*, (60 Barb., 163.)
Brundage agt. *Domestic and Foreign Missionary Society*, (60 Barb., 204.)

23. Considering the evident purpose and policy of section 52 of the statute of wills, (2 R. S., 66,) the mischief intended to be remedied, and the fact that it is a remedial statute, to be liberally construed, its meaning is, to prevent the lapse of a devise or bequest to a descendant of the testator, although the proposed devisee or legatee shall have died before the testator: provided such devisee or legatee shall have left lineal descendants, who shall be living at the testator's death; and this whether the death of the proposed devisee or legatee shall have occurred before or after the date or making of the will. (*Barnes* agt. *Huson*, 60 Barb., 598.)

24. The words "shall die," in section 52 of our statute, is not to be construed as referring to a time intermediate the

making of the will and the death of the testator. (*Id.*)

See ACTION. (60 Barb.,)

ADVERSE POSSESSION. (4 *Lansing*.)

DEVISE. (*Id.*)

EQUITABLE CONVERSION. (*Id.*)

WITNESSES.

1. On an examination of a party as a witness under sections 390 and 391 of the Code before a county judge, the judge has the power to compel the party to answer any and all questions which the judge shall determine relate to the issues raised by the pleadings in the action. (*Mudge* agt. *Gilbert*, *ante*, 219.)

2. Where the defendant is examined he may be compelled to answer questions relating to the defense interposed by him, and not pertinent to the affirmative claim made in the plaintiff's complaint, as well as to such facts as are essential to enable the plaintiff to make out his case as alleged in the complaint (*Id.*)

See CRIMINAL LAW. (60 Barb.,)

EVIDENCE (4 *Lansing*.)

HUSBAND AND WIFE. (*Id.*)

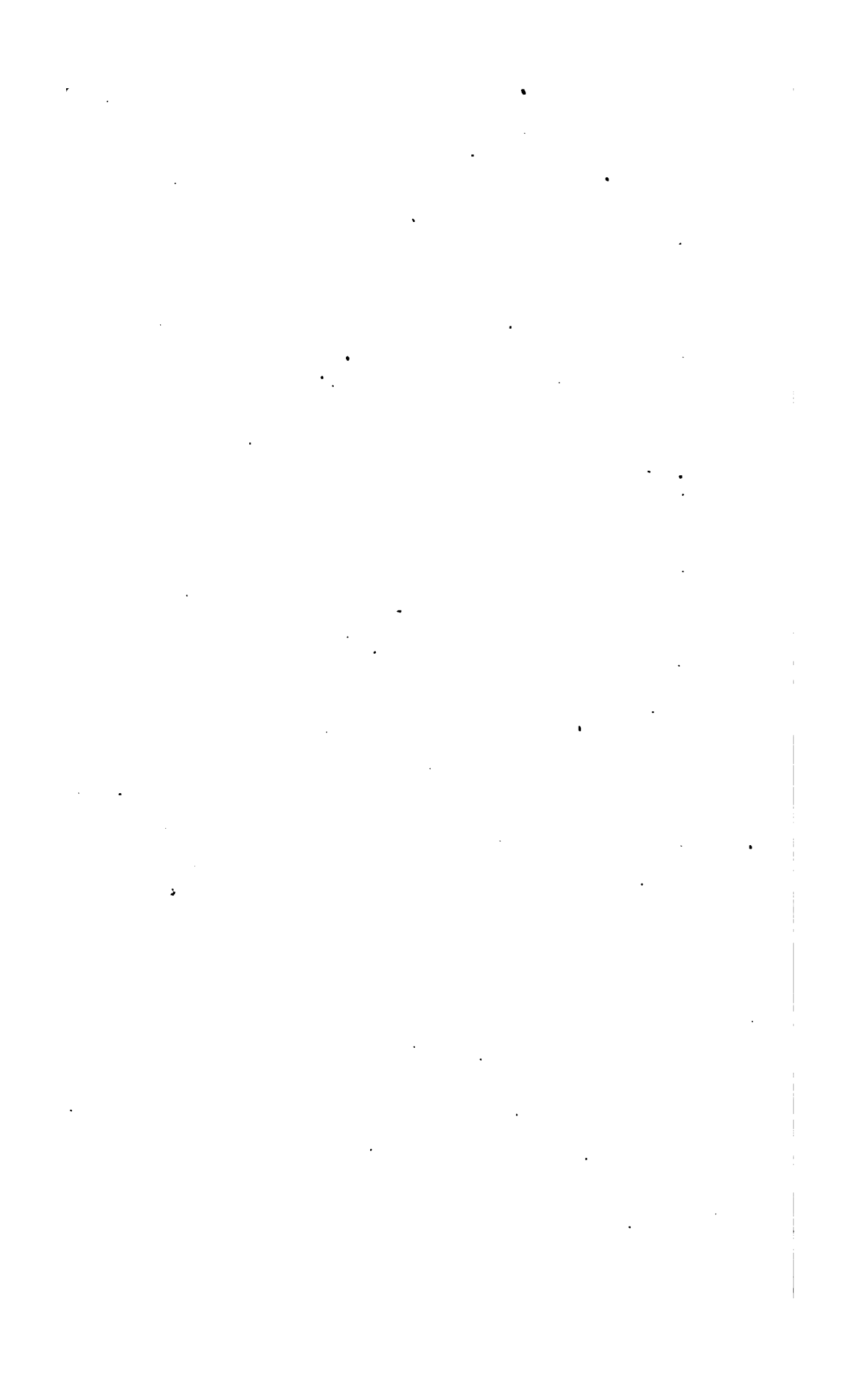
JUSTICE OF THE PEACE. (*Id.*)

WRIT OF ERROR.

See CRIMINAL LAW. (60 Barb.,)

WRITS OF NE EXEAT, MANDAMUS AND CERTIORARI.

See TITLES NE EXEAT, &c. (4 *Lansing*.)



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HARVARD

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